APPENDIX I

BRIEF FOR THE APPELLEE

United States Circuit Court of Appeals

No. 4647.

MRS. MARY BRYAN GORHAM,
APPELLANT,

v.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF OMAHA,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT WILSON.

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APPENDIX

INDEX

	Page
Table of Citations	ii–v
Statement of the Case and Points Involved	1– 4
First Question: Was the Action Seasonably Brought?	4–19
Controlling Dates	4
Policy Provision	4
Determinative Statutes	5– 6
Limitation of Policy is a Contractual Condition	6
C. S. 6290 is Read into the Policy	8
Second Question: Was there Substantial Evidence of Death by Accidental Means?	19–43
Policy Provision	19
Pleadings	19
Facts Shown by the Evidence	21–23
Applicable Law	33–44
Answer to Plaintiff's "Forty Points"	39–44
Third Question: Did Plaintiff Comply with Policy Conditions as to Notice and Proof of Loss?	44–63
Policy Provisions	44
Pleadings	45
Facts Shown by the Evidence	46–49
Applicable Law	49–63
Plaintiff Gave no Timely Notice and Furnished no Proof of Loss Before Suit	49–53
Federal Court Not Bound by State Court Decision on Procedural Law only in Transitory Actions and Gorham vs. Pacific Mutual is such a Decision	52–58
Plaintiff Bound by Negligence of Her Attorney	58
There Was No Waiver	58–63
Fourth Question: Did Plaintiff Violate the Autopsy Clause?	63–70
Policy Provision	63
Pleadings	63
Facts Shown by the Evidence	63
Applicable Law	66–70

APPENDIX

TABLE OF CITATIONS

Statutes:

	Page
Consolidated Statutes 407	6
Consolidated Statutes 415	5
Consolidated Statutes 6290	5
Consolidated Statutes 6479 (14)	5

Treatises:

American Law Institute, Restatement of Conflict of Laws, No. 595	54
7 Couch on Insurance, Sec. 1521-1521(a)	59

Cases:

Baba vs. *Mutual Benefit Health & Acci. Asso.*, 276 N. W. 795	50, 59
Beard vs. *Sovereign Lodge*, 184 N. C. 154	6, 7
Bessire vs. *Ward*, 209 N. C. 266	34
Boggan vs. *Provident Life & Acci. Ins. Co.*, 79 Fed. 2nd. 721	36
Brick Co. vs. *Gentry*, 191 N. C. 636	13
Burkett vs. *N. Y. Life Ins. Co.*, 56 Fed. 2nd. 105	40
Byrd vs. *Express Co.*, 139 N. C. 273	40
Carolina Transp. & Dist. Co. vs. *Amer. Alliance Insurance Company*, 214 N. C. 597	13
Carter vs. *Ins. Co.*, 208 N. C. 665	50, 56, 59
Central Surety & Ins. Co. vs. *Murphy*, 103 Fed. 2nd. 117	55
Cities Serv. Oil Co. vs. *Dunlap*,—U. S.—; 84 L. Ed. Adv. Op. 185	53
Clay vs. *Aetna Life Ins. Co.*, 53 Fed. 2nd. 689	67
Cline vs. *Southern Ry. Co.*, 31 Fed. Supp. 657	68
Clodfelter vs. *Wells*, 212 N. C. 823	54
Columbia Nat'l Life Ins. Co. vs. *Comfort*, 84 Fed. 2nd. 291	35
Delvecchio vs. *Bowers*, 296 U. S. 280	34
Dibbrell vs. *Ins. Co.*, 110 N. C. 193	9
Eckard vs. *Ins. Company*, 210 N. C. 130	11
Electric Co. vs. *Deposit Co.*, 191 N. C. 653	11
Erie R. R. vs. *Tompkins*, 304 U. S. 64	53
Farr vs. *Union Pacific R. R.*, 106 Fed. 2nd. 437	55

APPENDIX

	Page
Faulk vs. *Mystic Circle*, 171 N. C. 301	13
Frankel vs. *N. Y. Life Ins. Co.*, 51 Fed. 2nd. 933	20, 40
Fulton vs. *Ins. Company*, 210 N. C. 394	49, 61
Gorham vs. *Pacific Mutual Ins. Co.*, 214 N. C. 516; 215 N. C. 195	38, 43, 51, 52, 56, 59, 61
Guardian Life Ins. Co., vs. *Clum*, 106 Fed. 2nd. 592	55
Gunning vs. *Cooley*, 281 U. S. 90	40
Harris vs. *Ins. Co.*, 204 N. C. 385	34
Harrison vs. *R. R.*, 194 N. C. 656	56
Hedgecock vs. *Ins. Co.*, 212 N. C. 638	33
Heilig vs. *Ins. Co.*, 152 N. C. 358	2,4,7
Hill vs. *Ins. Co.*, 150 N. C. 1	38
Hill vs. Ins. Co., 207 N. C. 166	56
Holly vs. *London Assurance*, 170 N. C. 4	6,18
Hilmer vs. *Western T. Acc. Asso.*, 27 L. R. A. (N. S.) 319	59
Home Life Ins. Co. vs. *Moon*, 110 Fed. 2nd. 184	34, 35, 39
Humphrey vs. *Stephens*, 191 N. C. 101	11
Jefferson Standard Life Ins. Co. vs. *Clemmer*, 79 Fed. 2nd. 724	34, 35
Kearns vs. *R. R. Co.*, 139 N. C. 470	40
King vs. *Ins. Co.*, 197 N. C. 566	34
King vs. *Continental Casu. Co.*, 110 Fed. 2nd. 950	58
Land Oberoesterreich vs. *Gude*, 109 Fed. 2nd. 635	53
Lee vs. *Assurance Soc.*, 211 N. C. 182	56
Lewis vs. *Steamship Company*, 132 N. C. 904	40
Lightner vs. *Knights of King Solomon*, 199 N. C. 525	34
Love vs. *New York Life Ins. Co.*, 64 Fed. 2nd. 829	40
Lumber Co. vs. *Johnson*, 177 N. C. 44	13
McCaffrey, et al., vs. *P.*, 103 Fed. 2nd. 326	55
McCulloch vs. *Mutual Life Ins. Co.*,109 Fed. 2nd. 866	66
McLawhorn vs. *Ins. Company*, 208 N. C. 709	50
McMillan vs. *General American Life Ins. Co.*,—S. C. —; decided May 22, 1940	36
Mangol vs. *Metropolitan Life Ins. Co.*, 103 Fed. 2nd. 14	57
Maryland Casualty Co. vs. *Nellis*, 75 Fed. 2nd. 23	50
Mehaffey vs. *Ins. Co.*, 205 N. C. 701	34
Metropolitan Ins. Co. vs. *Hogan*, 62 Fed. 2nd. 135; 63 F. 2nd. 654	37
Meyers vs. *Ocean Acci. Co.*, 99 Fed. 2nd. 485	54

	Page
Misskelley vs. *Ins. Co.*, 205 N. C. 496	52
Missouri State Life Ins. Co. vs. *Pater*, 15 Fed. 2nd. 737	37
Modlin vs. *Ins. Co.*, 151 N. C. 35	11,18
Monger vs. *Lutterloh*, 195 N. C. 279	10
Moore vs. *General Acci. Fire & Life Ins. Co.*, 173 N. C. 532	49
Muse vs. *Ins. Co.* 108 N. C. 240	8
Mutual Benefit H. & A. Asso. vs. *Snyder*, 109 Fed. 2nd. 469	39
Nelson vs. *Business Men's Assu. Co.*, 108 Fed. 2nd. 363	39
Newton vs. *Employers Liability Ins. Corp.*, 107 Fed. 2nd. 164	11
N. Y. Fidelity & Plate Glass Ins. Co. vs. *Love*, 43 Fed. 2nd. 82	50
N. Y. Life Ins. Co. vs. *Gamer*, 76 Fed. 2nd. 543	14
N. Y. Life Ins. Co. vs. *Gamer*, 90 Fed. 2nd. 817	15
N. Y. Life Ins. Co. vs. *Gamer*, 303 U. S. 161	15, 34
N. Y. Life Ins. Co. vs. *Gamer*, 106 Fed. 2nd. 375	15, 34
N. Y. Life Ins. Co. vs. *Melgard*, 74 Fed. 2nd.	37
N. Y. Life Ins. Co. vs. *Sparkman*, 101 Fed. 2nd. 485	55
N. Y. Life Ins. Co. vs. *Stone*, 80 Fed. 2nd. 614	20, 40
Ocean Acci. Guar. Co. vs. *Moore*, 85 Fed. 2nd. 367	30, 57
Omaha Fire Ins. Co. vs. *Dierks*, 43 Neb. 569	59
O'Neil vs. *Metropolitan Ins. Co.*, 15 N. E. 2nd. 809	51, 59
O'Reilly vs. Curtin Pub. Co., 31 Fed. Supp. 364	55
Parker vs. *Ins. Co.*, 143 N. C. 339	12, 18, 62
Peeler vs. *U. S. Casualty Co.*, 197 N. C. 286	49, 50
Price vs. *Honeycutt*, 216 N. C. 270	10
Rhulin vs. *N. Y. Life Ins. Co.*, 304 U. S. 202	54
Rhulin vs. *N. Y. Life Ins. Co.*, 106 Fed. 2nd. 921	54
Rhyner vs. *Ins. Co.*, 196 N. C. 717; 199 N. C. 419	53
Rice vs. *R. R.*, 174 N. C. 268	40
Riddlesbarger vs. *Ins. Co.*, 7 Wallace 386	7
Rostan vs. *Huggins*, 216 N. C. 386	10
Rouse vs. *Old Colony*, 203 N. C. 345	6
Ryan vs. *Reynolds*, 190 N. C. 563	11
Sawyer vs. *Mutual Ben. H. & A. Asso.*, 121 Neb. 504	36, 41
Scales vs. *Prudential Ins. Co.*, 109 Fed. 2nd. 119	34, 35
Scott vs. *Ins. Company*, 208 N. C. 160	34

APPENDIX

	Page
Sheean vs. *Commr. Trav. Mut. Acc. Co.*, 88 A. L. R. 975	68
Spruill vs. *Ins. Co.*, 120 N. C. 141	33
Supply Co. vs. *Plumbing Co.*, 195 N. C. 635	10
Thigpen vs. *Ins. Co.*, 204 N. C. 551	30
Tobin vs. *Penn. R. R. Co.*, 100 Fed. 2nd. 435	54
Travelers Ins. Co. vs. *Wilkes*, 76 Fed. 2nd. 701	36
U. S. F. & G. Co. vs. *Yost*, 183 Miss. 65	54
Wachtel vs. *Equit. Life Assur. Soc.*, 266 N. Y. 345	51, 59
Warren vs. *Ins. Co.*, 215 N. C. 402	38
Welch vs. *Ins. Company*, 192 N. C. 809	6
Wharton vs. *Insurance Company*, 178 N. C. 135	38
Whiteside vs. *Assurance Company*, 209 N. C. 536	49, 52
Wichita Royalty Company vs. *City Nat'l Bank*, 306 U. S. 103	14
Williams vs. *U. S. Casualty Company*, 150 N. C. 597	49

APPENDIX

United States Circuit Court of Appeals

FOURTH CIRCUIT.

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v.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF OMAHA,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT WILSON.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE AND POINTS INVOLVED

This is an action upon a policy of accident insurance. A verdict was directed in favor of the defendant on eight issues on the ground that the evidence warranted only one reasonable inference, and that in defendant's favor. The eight issues involve four distinct propositions upon which the plaintiff has the burden of proof, all of which must be answered in her favor to justify a recovery. The plaintiff in this case has the burden of showing error in direction of the verdict as to each and every one of the four propositions. If the trial judge was justified in direct-

ing the verdict as to any one of the four, the judgment should be affirmed.

The four propositions which the plaintiff has the burden of proving will be stated in logical (and chronological) order.

1st PROPOSITION: *That the Action was Seasonably Brought*: The plaintiff has the burden of proving that she brought this action within two years after Aug. 8, 1933 (which date allowed ninety days for filing proof of loss plus sixty days for the company to investigate the claim, all as required by standard provisions of the policy *Heilig* vs. *Ins. Co.,* 152 N. C. 358) or that a proper suit was brought within such time and nonsuited, and that this, the new action, was instituted within apt time after the date of such nonsuit, towit, April 13, 1937. By the provisions of C. S. 6290, which statute modifies the policy contract in plaintiff's favor, the extended provision was limited to six months and therefore the plaintiff cannot carry this burden.

This action was brought April 8, 1938, more than six months after the nonsuit and more than four years after the two years limitation began to run. There was no dispute about the facts as found by the directed verdict on issues No. 6 and 7 in favor of the defendant. The court decided by its judgment that this action was brought too late in accordance with the defendant's contention. If so, this ends the case and the judgment must be affirmed.

2nd PROPOSITION: *That there was substantial evidence of Death by Accidental Means.* Plaintiff has the burden of showing that the death of the insured was loss of life "resulting directly and independently of all other causes from bodily injuries sustained while this policy is in force, through purely accidental means (suicide, sane or insane is not covered), ... subject however to all the provisions and limitations hereinafter contained," as required by the coverage provision of the policy. Facts on this point were settled by the directed verdict, issue No. 5, that the insured died by suicide, and issue No. 8 that the insured did not die as a result of bodily injuries through purely accidental means. The court held that there was no evidence presented which could reasonably support a finding that the insured died as a result of accidental means.

3rd PROPOSITION: *That plaintiff gave notice and furnished proof of loss.* Plaintiff has the burden of showing that she gave "immediate notice" of "accidental death" as required by standard provision No. 4 of the policy, or that it was not "reasonably possible to give such notice and that notice was given as soon as was reasonably possible," as required by standard provision No. 5 of the policy (C. S. Sec. 6479 sub-section 5 Standard Accident Policy Act); and that she furnished "affirmative proof of loss" . . . . . within ninety days after the date of such loss (which was Mch. 8, 1933) as required by standard provision No. 7 of the policy or that, in lieu of notice and proof given as soon as reasonably possible, she was excused from giving any notice or making any proof by the conduct of the defendant amounting to a waiver of these requirements. The facts involved here were settled by the directed verdict, issues No. 1, 2 and 3, in favor of the defendant, that notice and proof were not furnished as required by the policy and by the court's refusal to submit issues tendered by the plaintiff (No. 3 and 6) which involved plaintiff's contentions with respect to waiver. The court held that there was no evidence presented which could reasonably support a finding that the plaintiff gave the notice or furnished the proof of loss, either within the time limit in the policy or as soon as reasonably possible, and that the evidence relied upon by the plaintiff to show waiver was insufficient to warrant the submission of an issue on that question.

4th PROPOSITION: *That plaintiff did not breach the autopsy clause.* The defendant having specifically pleaded the breach of standard provision No. 8 giving to it "the right and opportunity to make an autopsy in case of death, where it is not forbidden by law", plaintiff has the burden of showing compliance with this provision (clause 8 of standard accident policy, C. S. 6479); or that compliance therewith was waived by the defendant. The facts on this point were settled by the directed verdict, issue No. 4, that the plaintiff did not give the defendant the right and opportunity to have an autopsy or its equivalent as required by the policy, and by the refusal of issues No. 4 and 5 tendered by the plaintiff bearing on the question of waiver. The court held that there was no evidence presented which could reasonably support a find-

ing that the plaintiff gave the defendant the right and opportunity to have an autopsy, or its equivalent, and that the issue tendered by the plaintiff, No. 4, (timely demand), was unsupported by any evidence and plaintiff's issue No. 5 (defendant got the information otherwise before trial), was immaterial as a matter of law.

If the plaintiff carries the burden of this appeal by showing error in every single one of the four foregoing rulings of the trial court, the judgment should be reversed. If the ruling of the court was correct on any one of the foregoing propositions, the judgment should be affirmed.

ARGUMENT

1ST QUESTION: WAS THE ACTION SEASONABLY BROUGHT?

CONTROLLING DATES

The death occurred on March 8, 1933; the ninety days for filing proof of loss expired June 8, 1933; the sixty days for the company to investigate expired Aug. 8, 1933. The original suit was brought February 25, 1935, and was nonsuited April 13, 1937. This suit was brought April 8, 1938, within a year, but more than six months after the nonsuit, and more than four years after the two year limitation began to run, June 8, 1933, or Aug. 8, 1933. (*Heilig* vs. *Ins. Co.*, 152 N. C. 358).

POLICY PROVISIONS

Standard Provision 14: "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

Standard Provision No. 7: "Affirmative proof of loss must be furnished to the association at its said office in case of claim . . . . . within ninety days after the date of such loss."

Additional Provision B: "Strict compliance on the part of the insured and beneficiary with all the provisions

and requirements of this policy . . . . is a condition precedent to recovery and any failure in this respect shall forfeit to the association all right to any indemnity."

STATUTES DETERMINATIVE OF THIS QUESTION.

Section 415 of the Consolidated Statutes of 1919 of the chapter on limitations:

> "NEW ACTION WITHIN ONE YEAR AFTER NONSUIT, etc.: If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis."

This is a re-enactment of the Revisal of 1905, Sec. 370, and North Carolina Code of 1883, Sec. 166, no changes or amendments affecting the question here involved.

Section 6290 of the Consolidated Statutes of North Carolina, chapter on insurance:

> "STIPULATIONS AS TO JURISDICTION AND LIMITATIONS OF ACTIONS: No company or order, domestic or foreign, authorized to do business in this state under this chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void."

The history of this section will be developed in connection with the decisions hereinafter discussed.

Section 6479, sub-section 14 of Consolidated Statutes

of North Carolina of 1919, chapter on insurance, providing a standard policy of accident insurance:

> "Limiting Time of Action: A standard provision limiting the time within which suit may be brought upon the policy shall be as follows: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

It will be noted that standard provision 14 of the policy in suit is in the exact language of the statute.

The question here involved is whether plaintiff had one year from the date she took her nonsuit in her former action under C. S. 415, or only six months under standard provision 14 of the policy as extended by C. S. Sec. 6290.

THE STANDARD POLICY PROVISION NO. 14 REQUIRING SUIT TO BE BROUGHT AT ALL EVENTS WITHIN TWO YEARS AFTER PROOF OF LOSS AS REQUIRED BY THE POLICY IS NOT A LIMITATION OF ACTION BUT A CONTRACTUAL CONDITION.

Indeed, additional provision B expressly so provides, but aside from said additional provision that is the law of North Carolina. *Rouse* vs. *Old Colony,* 203 N. C. 345; *Welch* vs. *Ins. Co.,* 192 N. C. 809; *Holly* vs. *London Assurance,* 170 N. C. 4; *Beard* vs. *Sovereign Lodge,* 184 N. C. 154.

A consequence of this distinction is that statutes extending the limitations provided in the chapter on Limitations of the Consolidated Statutes do not affect the provision of an insurance policy fixing time for bringing suit.

One such extension statute is C. S. 415, above quoted, and here relied on by the plaintiff. Another in the same chapter is C. S. 407 which provides that any person who is, at the time his cause of action accrued, either a minor, or insane, or imprisoned on a criminal charge, may bring his

action "within the times herein limited, after the disability is removed."

The insanity, imprisonment, or minority of the beneficiary or insured does not, under this statute, extend the time provided in his policy of insurance for bringing suit for the reason that such policy provision is "not a statute of limitation but a contract which imposes restriction upon the right of action." *Beard* vs. *Sovereign Lodge,* 184 N. C. 154; *Holly* vs. *London Assurance,* 170 N. C. 4; *Heilig* vs. *Ins. Co.,* 152 N. C. 358. (Accident policy.)

Likewise and for the same reason C. S. 415 does not extend the time for bringing suit beyond the time limited in the policy.

That statute, like C. S. 407, is codified in the chapter on limitations and expressly refers to the limitations provided by statute. The language of C. S. 407 is "the times herein limited", and the language in C. S. 415 is "the time prescribed therefor." If action is begun within such time and nonsuited a new action may be commenced within one year.

Statutes like C. S. 415 are quite common, if not universal, and such a statute was construed in *Riddlesbarger* vs. *Ins. Co.,* 7 Wallace 386, 19 L. ed. 257; by U. S. Supreme Court, which held valid a condition in a policy of insurance against the maintenance of any action thereon unless commenced within twelve months after the loss; and further held that the statute of the state, which allows the party who suffers a nonsuit in an action brought in time to bring a new action within one year afterwards, does not affect the rights of the parties to the contract. The court said:

> "The action mentioned which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained unless such action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced and the court cannot insert one without changing the contract."

APPENDIX

In 1885 C. S. Sec. 6290 was N. C. Code of 1883, Section 3076, chapter on insurance, which read as follows:

> "No person licensed to do insurance business under this chapter shall limit the term within which any suit shall be brought against such person to a period less than one year from the time when the loss insured against shall occur."

At the same time C. S. 415 was in force as N. C. Code of 1883 Sec. 166, which provided:

> "If an action shall be commenced within the time prescribed therefor and the plaintiff be nonsuited . . . . the plaintiff . . . . may commence a new action within one year after such nonsuit."

In this statutory situation one Muse had a loss on a fire policy on the 31st day of August, 1885, which policy provided that "No suit or action against this corporation for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action be commenced within twelve months next after the loss shall occur." In Nov. 1885 Muse brought a suit which was removed to the Federal Court and was there nonsuited in October 1887. In the same month Muse commenced another action in the state court. The plaintiff contended that the twelve months limitation in the policy should be construed as a statutory limitation and that it was subject to enlargement by the Code, Sec. 166. In holding against this contention the Supreme Court of North Carolina in *Muse* vs. *Assurance Co.,* 108 N. C. 240, at 242, decided Feb. 1891, said:

> "The weight of authority sustains the position, also, that the rights of the parties in such cases are fixed by the contract, and that the contract must be construed as requiring that *the action which is prosecuted to judgment* (not a suit begun previously) must be brought within twelve months after the loss occurs . . . . ", citing *Riddlesbarger* vs. *Ins. Co.,* 7 Wallace 386; 19 L. Ed. 257.

In the same case the court said at page 243:

> "If instead of prohibiting licensed insurance companies from stipulating that actions should begin

within a shorter period than 1 year the Legislature had, by appending an additional sub-section under section 156 of the Code (the one year statute of limitations on actions against sheriffs etc), prescribed one year as the limit for bringing the action for a loss sustained by the assured, there would have been good ground for the contention that the right of action will still subsist for a year after 'nonsuit, reversal or arrest of judgment', under the provisions of Sec. 166 of the Code."

On the authority of the *Muse case* the court held in *Dibbrell* vs. *Ins. Co.*, 110 N. C. 193, that the one year limitation in a policy of insurance was not a statute of limitation, which could be extended only upon an agreement in writing, and upon consideration, but on the contrary was a contractual provision which could be waived by the insurance company. Of the *Muse case* the court said:

"Indeed in that case it was declared that plaintiff might have submitted to judgment of nonsuit and brought a new action within a year after such judgment, though after the expiration of twelve months from the fire, *if the limit had been imposed by statute instead of by contract.*"

In 1899 by chapter 54 of the Public Laws of that year, the regulations affecting the insurance business in North Carolina were completely overhauled. By Section 23 of that act section 3076 of the Code of 1883 was re-enacted in the following language:

"No such company shall make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year *after the cause of action accrues,* and any such condition or stipulation, shall be void."

This re-enactment was substantially repeated in section 106 of same act. By the same act Sec. 43 established the standard fire insurance policy, (Revisal 1905 Sec. 4760, C. S. 1919, sec. 6437) which policy includes in sub-section F the following condition:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of

law or equity . . . . unless commenced within twelve months *next after the fire.*"

And also the clause:

"The loss shall not become payable until sixty days after . . . . proof of the loss herein required."

Code Sec. 3076, as re-enacted in 1899, supra, was again amended March 4, 1901, by Chap. 391 Sec. 8 Public Laws of 1901, by inserting after the prohibition against limitation of time for suit to less than one year, the language "or to less than six months from any time at which a plaintiff shall take a nonsuit to an action begun within the legal time". The code section as thus amended was re-enacted as Sec. 4809 of the Revisal of 1905, and again in 1919 as Section 6290 of Consolidated Statutes. There has been no change since 1901. The amendment of 1901 was evidently intended to supply the lack of legislation giving reasonable protection to the insured and the beneficiary which was the basis of decision in *Muse* vs. *Assurance Company,* 108 N. C. 240. The amendment of 1901 provided the same relief against contractual limitations in insurance policies that C. S. 415 provides against statutes of limitation, except that the extension of time in such insurance cases is limited to six months, instead of one year.

IN APPLYING THE PROVISIONS OF C. S. 6290, FOR THE BENEFIT OF THE INSURED AND THE BENEFICIARY, THE NORTH CAROLINA COURT READS THE STATUTE INTO THE POLICY. THE PLAINTIFF MAY BRING SUIT WITHIN THE TIME STATED IN THE POLICY, OR WITHIN THE TIME STATED IN THE STATUTE, WHICHEVER IS LONGER. BUT A SUIT, BROUGHT AFTER THE TIME LIMITED IN THE POLICY AND ALSO AFTER THE TIME FIXED BY THE STATUTE, CANNOT BE MAINTAINED.

This is in accordance with the general rule of law that laws in force at the time a contract is made, become a part of the contract, with the same effect as if expressly incorporated therein. *Rostan* vs. *Huggins,* 216 N. C. 386, and bottom 388; *Price* vs. *Honeycutt,* 216 N. C. 270, middle 274; *Supply Co.* vs. *Plumbing Co.,* 195 N. C. 635; *Monger*

vs. *Lutterloh,* 195 N. C., at page 279; *Electric Co.* vs. *Deposit Co.,* 191 N. C. 653; *Humphrey* vs. *Stephens,* 191 N. C. 101; *Ryan* vs. *Reynolds,* 190 N. C. 563.

In applying this principle to insurance policies, it is held in *Eckard* vs. *Ins. Co.,* 210 N. C. 130

> "Statutory provisions in force at the time of the issuance of a policy of insurance become a part thereof as though expressly incorporated therein, and statutory provisions will prevail over conflicting provisions of the policy."

In *Newton* vs. *Employer's Liability Ins. Corp.,* 4th C. C. A. (Nov. 6, 1939) 107 Fed. 2nd. 164, a statute similarly worded was held to be effective as a new clause in the policy.

The statute provides that a condition forbidden by it is void. This clause was inserted by the General Insurance Law of 1899, (Chap. 54) which re-enacted the section of the Code forbidding a requirement that suit be brought in less than one year "after the cause of action accrued". The same act establishes the standard fire insurance policy and requires it to contain a condition that no suit shall be brought more than twelve months "after the fire", and another condition that the right of action shall not accrue until sixty days after filing proof of loss. The condition of the policy relating to time for bringing suit, which the law requires, is by its own terms a violation of another section of the same act in that twelve months "after the fire" is a shorter time than one year "after the cause of action accrued". *But the North Carolina Court did not declare the standard policy provision void, but read into it the other section of the act, construed the two sections together,* and held in *Modlin* vs. *Insurance Company,* 151 N. C. 35, at page 45, that the policy condition was construed as if the language of the statute were therein incorporated. In that case the action was brought more than twelve months after the fire, which was the time fixed in the policy, but within one year after the cause of action had accrued sixty days after the time for filing proof of loss. This case settles the proposition that C. S. 6290 is construed as being a part of every contract of insurance, and its provisions, where more favorable to the insured than the policy, override the policy provisions.

This is made even plainer, and applied to the 1901 amendment extending the contractual limitation to six months after a nonsuit, in the case of *Parker* vs. *Ins. Co.*, 143 N. C. 339, decided December 11, 1906, citing the applicable provision of the Revisal of 1905. C. S. 6290 is Revisal Sec. 4809. In that case the policy was issued November 8, 1901, when the amendment effective March 4, 1901 was in force. The fire occurred November 18, 1901. Proofs of loss were filed in January or February, 1902, liability promptly denied before suit brought, (this latter fact appears from the record, but not from the opinion), and suit was brought February 26, 1902. There was no dispute that the action was brought in time and was nonsuited, the exact date not appearing. Another action was commenced on May 7, 1904. "It appears, at least inferentially, that a nonsuit was taken *and this action was brought within six months afterwards.*" (Page 341, middle.) The defendant contended that the action brought May 7, 1904, more than twelve months after the fire, or after the time cause of action accrued, was too late, and relied upon the *Muse case, supra.* In holding against that contention the court said (pages 343 and 344):

> "The remaining position of the defendant is equally untenable. This action was commenced within six months after the discontinuance of the former action upon the same policy, even if it had been discontinued, which does not appear very clearly in the record. The Revisal, Sec. 4809, provides that no insurance company shall limit the time within which an action may be commenced to less than one year after the accrual of the cause of action, or to less than six months from the time a nonsuit is taken in an action brought upon the policy within the time originally prescribed. *Such a stipulation in the policy is a contractual limitation,* and has been held by this Court to be valid when it does not conflict with any provision of the statute. *Dibbrell* vs. *Ins. Co.*, 110 N. C. 193; *Muse* vs. *Assurance Co.*, 108 N. C. 240. *But the law has been changed by the Legislature, as we have shown, since the decision in Muse's case,* in which it was held that the suit must be brought within twelve months after the loss occurred and not afterwards, and it must be the same suit which was commenced

within that period and prosecuted to judgment, and not a new suit brought upon nonsuit taken in a former action which was itself begun within the twelve months. Revisal, Sec. 4809. In this case the facts are that a suit was commenced within the twelve months and a nonsuit taken therein, but when it was entered is not distinctly shown. The record in the action "in which the nonsuit was entered" was put in evidence, but it does not accompany the transcript. We must assume that it appeared from that record, and the one in the present case, that *this suit was brought within six months after the nonsuit, because that* finding of fact sustains the Court's ruling, and we do not presume error, as we have already said in considering a former exception."

It will be observed that in the *Parker case the court read the statute,* Revisal 4809, C. S. 6290, *into the contract, to extend the time* to six months after nonsuit of an action commenced in apt time. This construction has been confirmed in more recent cases, not themselves involving the six months extension after non-suit, but summarizing the law, *Faulk* vs. *Mystic Circle,* 171 N. C. 301, 302; *Lumber Co.* vs. *Johnson,* 177 N. C. 44, bottom 48; *Brick Co.* vs. *Gentry,* 191 N. C. 636, 641 middle.

So far as we can find the court has not passed on this precise question again. It had a case before it in *Carolina Transp. & Distributing Co.* vs. *American Alliance Ins. Co.,* 214 N. C. 597, in which the court applied C. S. 415 to a policy limitation, without citation or reference to the existence of C. S. 6920, or the cases construing that statute. But neither the statute nor any of these cases was brought to the attention of the court, or relied upon, and in the defendant's brief, page 9, appears the following: "We concede that a plaintiff has the right to reinstitute a suit, with the exception hereafter mentioned, within one year after a nonsuit". (We are filing with the Clerk of this Court copies of the record and briefs.) The brief then proceeds to argue two points: First, that the previous action was not disposed of by nonsuit, but upon a judgment rendered, after hearing the facts, that the plaintiff was not entitled to maintain the action; and second, that the second action was not the same suit previously instituted, but an entirely different suit between different par-

ties. The Supreme Court held contrary to both these contentions of the defendant. *The opinion of the court did not cite the statute or any of the cases discussed in this brief, which are the only pertinent cases construing the statute in this respect.* The court cites only the statute C. S. 415, providing for new suit after nonsuit within one year, and *Meekins* vs. *R. R.*, 131 N. C. 1, which was a suit under Lord Campbell's act for wrongful death. The *Meekins case* involved a limitation prescribed by statute (Lord Campbell's Act) and not by contract. In the *Meekins case* the court did not deal with or cite the Insurance Section 6290, or any of the cases construing it, being those discussed in this brief. They were not involved in a wrongful death case. The opinion dealt strictly with statutory limitations of one kind or another, and of a general nature not controlled by another special statute. (While the authority of the *Meekins case* is recognized in wrongful death cases, it may be pointed out that even in such cases arising under the Federal Employers Liability Act, where the statutory limitation is two years, our court follows the Federal Rule that the limitation is not enlarged by C. S. 415 permitting new suit after nonsuit, within one year).

It is submitted that the court should not regard the recent decision in *Distributing Co.* vs. *Ins. Co.* as overruling all the cases holding to the contrary, establishing a rule of law which goes back fifty years. Public policy requires that the law be stable. It also favors the policy of limitations to prevent the assertion of stale claims. In actions upon insurance contracts, a policy favoring the assertion of old claims would deprive the insurance company of the opportunity of timely investigation, a substantial right.

The *Erie case* substantiates the Circuit Court of Appeals for the Supreme Court of North Carolina, and the Circuit Court has the same power and authority as that Supreme Court to evaluate and interpret a decision. *Wichita Royalty Co.* vs. *City National Bank,* 306 U. S. 103, 83 L. ed. 515, 517 (Jan. 30, 1939).

The construction of C. S. 6290 was not discussed or decided in the *Distributing Co. case.* It was a question which merely "lurked in the record." The case therefore was not so decided as to constitute a precedent. A case exactly in point is *New York Life* vs. *Gamer.* That case

was tried in the District Court of Montana and through the Ninth Circuit Court of Appeals (76 Fed. 2d 543, 90 Fed. 2d 817) to the Supreme Court (303 U. S. 161, 82 L. ed. 726) as one involving the status of the presumption against suicide at common law. The Supreme Court decided that since there was some evidence of suicide the presumption did not have the quality of evidence and disappeared from the case. On the last trial in the District Court and the last appeal in the Ninth Circuit, 106 Fed. 2d 375 (certiorari denied Dec. 11, 1939, 60 S. Ct. 294, 84 L. ed. (advance opinions) 249) it appeared for the first time that sections 10600 and 10606 of the Revised Code of Montana, 1935, provided a *statutory* presumption of accidental death and provided that such a presumption does not disappear when there is enough evidence to support a finding adverse to it, but remains in the case, *"as indirect evidence."* And Code, section 10672 also referred to a "presumption or *other evidence.*" It was held that the Federal Court was bound by the statutes of Montana. The insurer contended that the opinion of the Supreme Court was controlling, and was even "the law of the case." In holding against this contention the Circuit Court wrote:

> "For the reasons now stated, we do not agree with appellant's contention that the rule stated in the Supreme Court's opinion is the law of the case with reference to this new issue of law as to the validity of the instruction.
>
> "In our opinion in the second appeal we treated the case, under the rule in *Swift* vs. *Tyson,* 16 Pet. 1, 10 L. ed. 865, as one where, in the absence of controlling state statutes, the federal courts have the power to determine the law of a state, though its determination may differ from that of the courts of that state. Not only was no state statute considered in the opinion, but no decision of any of the Montana courts. We assumed that we were controlled by what sometimes has been called the federal common law. The fact that all the federal courts have judicial knowledge of the Montana statutes made the question one that could and should have been decided in accordance with that law, but that was not done. *'Questions which merely lurk in the record, neither brought to the attention of*

the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New* vs. *Oklahoma,* 195 U. S. 252, 256, 25 S. Ct. 68, 49 L. ed. 182; *Tefft, Weller & Co.* vs. *Munsuri,* 222 U. S. 114, 119, 32 S. Ct. 67, 56 L. ed. 118; *U. S.* vs. *More,* 3 Cranch 159, 172, 2 L. ed. 397; *The Edward,* 1 Wheat. 261, 275, 276, 4 L. ed. 86 . . . . ' *Webster* vs. *Fall,* 266 U. S. 507, 511, 45 S. Ct. 148, 149, 69 L. ed. 411.

"The opinion of the Supreme Court assumed, as did ours, that there were no statutes of the State of Montana determining the effect of a rebuttable presumption. In its citation of authority it mentions but one Montana case concerning the quantum of evidence necessary to overcome a rebuttable presumption, in which no reference is made to the statutory law of that state in that regard. There was a dissent by Mr. Justice Black in which there is no mention of any of these Montana statutes. *New York Life* vs. *Gamer,* 303 U. S. 161, 58 S. Ct. 500, 82 L. Ed. 726, 114 A. L. R. 1218.

"Since the question of Montana's statutory law on the effect of a rebuttable presumption was not 'discussed and decided' by the Supreme Court in this 'case of a reversal', the decision of the Supreme Court with respect to the general non-statutory law of the function and effect of a rebuttable presumption is not the law of the case. That question is now presented for discussion and decision for the first time."

To the same effect are *Pacific S. S. Co.* vs. *Peterson,* 278 U. S. 130, 136, 73 L. ed. 220, 223, followed in *J. C. Eno (U. S.) Ltd.* vs. *Coe,* 106 Fed. 2d 858, 859; and *Bailey* vs. *Baker Ice Machine Co.,* 239 U. S. 268, 272, 60 L. ed. 275, 285; *de Long* vs. *Jefferson Standard Life* (5th Circuit, Feb. 19, 1940), 109 Fed. 2d 585, 586; *Satterlee* vs. *Harris* (C. C. A. 10th), 60 Fed. 2d 490. These last two cases related to the authority of state court decisions and held that they were not binding on the Federal courts since the point was not "made an issue in the case."

In *Mangol* vs. *Metropolitan* Life (C. C. A. Ill. 1939), 103 Fed. 2d 14 the court defined its duty to apply the substantive law of the state under the *Erie case* to be as fol-

lows: (p. 17): "If a line of decisions clearly establishes a rule of law which has been approved by the court of last resort of a state, such rule must be recognized *until it clearly appears that it has been overruled by the court of last resort.*" In that case the court applied the rule established by earlier cases rather than a later case.

An examination of the opinion in *Distributing Co.* vs. *Ins. Co. does not show that the North Carolina Supreme Court intended to overrule all the earlier cases and refuse to enforce a statute.* Such an intention is always expressed. Such a purpose is always accomplished directly. The principle involved was not even at issue in the case. All sides merely assumed the suit in one year was good as far as the *time* was concerned. The defendant expressly conceded it in its brief. Neither the pertinent statute nor any case construing it was mentioned before the court in either oral argument or brief; and the court's opinion cites none of them. A statute cannot be repealed by a decision which merely assumes that it is non-existent. It cannot be doubted that the North Carolina court would still recognzie and enforce the state statute C. S. 6290 and follow its previous uniform line of decisions thereon if the question were presented, as it is in this case. It is the duty of the Circuit Court of Appeals to follow that course.

In the argument in the District Court plaintiff relied principally upon the case of *Distributing Co.* vs. *Ins. Co.* already fully discussed. But the plaintiff also insisted that if that case did not repeal the statute, C. S. 6290, nevertheless under the decisions C. S. 415 applies to all limitations created by statute and that standard provision No. 14 in an accident policy is a statutory limitation, because insurance companies are required to include that provision in every policy by the Standard Policy Act, C. S. 6479, subsection 14, first passed in 1911, and in its present form since 1913. Some authority was cited from other states, but none at all from North Carolina. These cases, cited on pages 54 and 55 of the plaintiff's brief, do not purport to construe a statute especially applicable to insurance policy limitations, such as C. S. 6290. They were decided as they were and in accordance with the North Carolina case, *Distributing Company* vs. *Ins. Co.*, 214 N. C. 596, as if the general limitation statute, C. S. 415 was the only statute which applied.

The proposition is intrinsically unsound and has been rejected by the North Carolina Court. A suit upon a standard insurance policy, either fire or accident, is still a suit upon a contract and governed by the law of contract. It is not a suit to enforce a statutory liability. If plaintiff's view were sound the amendment to C. S. 6290 made in 1901 would have been entirely unnecessary. The standard fire insurance policy was adopted in 1899. And yet in 1901 the Legislature found it necessary to provide relief for policy holders. If in 1901 a new suit on a fire insurance policy was permissible if begun within one year after a nonsuit, under C. S. 415, what would have been the use of amending the statute to permit such a suit to be brought in six months?

And the North Carolina court, since the Standard Fire Insurance Policy Act of 1899, as well as before, has consistently held that the time limitation in the policy is contractual and not statutory. One Holly in 1915 attempted to excuse his failure to bring an action on a standard fire insurance policy within the limitation period prescribed therein by alleging that he was imprisoned in the common jail, and was entitled to the benefit of this disability, under C. S. 407, which exempts a person imprisoned from statutes of limitation. The Court said:

> "The twelve months clause in the policy is not a statute of limitation, but a contractual limitation . . . . It is a valid contract entered into between parties, and the disabilities which stop the running of a statute of limitations have no effect upon them. Such a stipulation is binding, even upon a minor, who must abide by it."

This case is *Holly* vs. *London Assurance,* 170 N. C. 4. In *Parker* vs. *Ins. Co.,* 143 N. C. 339 the court was dealing with the standard fire insurance policy and held that the time stipulation was contractual and not statutory and that therefore the plaintiff had no right to bring a new suit within a year after nonsuit under C. S. 415, but that he would have a right to bring a new suit within six months after nonsuit under C. S. 6290. The court took the same position in *Modlin* vs. *Ins. Co.,* 151 N. C. 35 at 45 where it was held that by the terms of a standard contract, with C. S. 6290 read into it, the plaintiff had a con-

tractual right to bring a suit within one year after his cause of action accrued under the statute instead of twelve months after the fire, as stated in the standard policy. It seems plain that the court has found no merit in the contention that the adoption of a standard policy makes the time limitation a statutory limitation rather than a contractual limitation, so far as North Carolina is concerned. This has eliminated the embarrassing question as to which of the two extensions of time would apply, the one year under C. S. 415 or the six months under Sec. 6290.

CONCLUSION

Where both policy and statute are silent as to a new suit after nonsuit, no new suit may be maintained unless itself begun within the time condition of the policy. *Muse* vs. *Ins. Co. supra.*

Where the policy is silent but the statute permits a new suit within six months after nonsuit such a new suit may be maintained if itself begun in six months. *Parker* vs. *Ins. Co. supra.* But in that situation where the new suit is begun more than six months after nonsuit and after the time limited in the policy has expired, the suit cannot be maintained. That happened in this case and for that reason the directed verdict was correct, issues 6 and 7, and the judgment was warranted by the verdict.

SECOND QUESTION: WAS THERE SUBSTANTIAL EVIDENCE OF DEATH BY ACCIDENTAL MEANS, WITHIN THE MEANING OF THE POLICY PROVISION?

Policy Provision:

The policy insures for $7500.00 against "loss of life * * * * resulting directly and independently of all other causes, from bodily injuries sustained while this policy is in force, through purely accidental means (suicide, sane, or insane, is not covered), * * * * subject however, to all provisions and limitations hereinafter contained".

PLEADINGS:

The complaint alleges that "he, the said Dr. Louis Rhodes Gorham, came to his death through purely accidental means, said death resulting directly and independently of all other causes, from bodily injuries. That said

death of the husband of the plaintiff occurred in the City of Rocky Mount, N. C., on the night of the 8th, or the morning of the 9th day of March, 1933, and was the result of a bullet wound from a pistol fired into the back of the head of said insured while he was sitting at his desk, in his office in said city, *by some person or persons whose identity is unknown to this plaintiff*".

The answer denies death by accidental means, and also alleges specifically that it was the "result of intentional suicide, a risk not insured against in said policy".

The plaintiff specified in her complaint that the death was homicidal, that it was caused by the act of another person, whose identity was to her unknown. This plea of homicide, denied by the defendant, alleging suicide, staked out the ground for debate in the trial. The identity of Dr. Gorham was known to the plaintiff, so her allegation excludes the idea of a self-shooting through accidental means. Upon the pleadings the principal issue in the case was whether the pistol shot wound was self-inflicted, or not. Upon the pleadings the plaintiff assumed the burden of proving that the wound was not self-inflicted. There is no suggestion either in the pleadings or in the evidence of a wound self-inflicted through accidental means, such as that the insured was cleaning or oiling his pistol, or that he was handling it for some other purpose than that of doing away with himself. She could have advanced the theory of assassination, without specifically pleading it, as in *Frankel* vs. *New York Life Ins. Co.*, (C. C. A. 10th, 1931) 51 Fed. 2nd. 933, at page 935, and *New York Life Ins. Co.* vs. *Stone,* (C. C. A. 1st, 1935) 80 Fed. 2nd. 614 at page 616. In those cases verdict was directed for the insurance companies on the absence of evidence of any motive for murder, and any opportunity for the commission of homicide; and for that, in both cases, the evidence was insufficient to support a finding upon any reasonable hypothesis except of suicide.

In the trial the whole of the plaintiff's effort was the attempt to bring out some evidence of opportunity and motive for assassination (robbery) and tending to show that the wound was not self-inflicted. The case was tried on the theory laid down in the pleadings, to-wit, that the plaintiff had the burden of showing that the wound was not self-inflicted, and that the pistol was fired by someone else who had a motive and an opportunity.

APPENDIX

FACTS SHOWN BY THE EVIDENCE:

Dr. Gorham died on the night of March 8th-9th, 1933. He was found on the morning of March 9th by Daisy Hamlet, colored janitress, who immediately called police officers E. L. Stephenson and O. P. Hedgepeth. They called the County Coroner, Dr. J. G. Raby, of Tarboro, N. C., who immediately made an investigation, with Dr. J. R. Norton, who was the City Health Officer of Rocky Mount. Dr. Gorham was sitting in his desk chair, in the reception room of his suite of dental offices, on the second floor, above a drug store at the corner of Washington and Tarboro Streets in Rocky Mount, facing both entrances to his room, (one door to his operating room, and the other to the corridor. See map), near and with his back to the west wall of the reception room, all the windows to the streets outside being closed, and with no bullet holes through any of them. Dr. Gorham was slumped over to the left, with his forehead resting upon the edge of the desk, his spectacles slightly disarranged, and with a bullet wound in his scalp a short distance above and behind the right ear, and a fracture of his skull a short distance above and behind his left eye, where the bullet had lodged against the bone. He was righthanded. (R. 258, Supp. 59). Both his hands were hanging down, arms extended, and his right hand was between his legs and extending down to within a few inches of the floor. On the floor, immediately beneath the fingers of his right hand, was a .32 pistol containing one discharged cartridge, and four undischarged ones. The pistol belonged to him.[1] He had owned it for years,

[1] R. 203, Dr. J. R. Norton, Deft. Supp. 48; R. 271, Mrs. Ward, Deft. Supp. 60–61; R. 311, P. C. Zimmerman, Deft. Supp. 71. In her brief plaintiff complains that no evidence of the ownership of the pistol was produced by another company (Pacific Mutual) in another trial. Though this is irrelevant, this being another lawsuit, nevertheless the claim is unfounded. On page 34 of that Record Dr. Savage testified that Dr. Gorham's brother told him where the pistol was kept before the date of death; that he (the witness) saw the box in which "the pistol had been kept. Someone in the family had it." Zimmerman testified on page 57 of that Record that Mrs. Gorham showed him the pistol. He was not asked in that trial what she said about its ownership. In that trial there was no suggestion that it was owned by anyone but Dr. Gorham.
The labored effort of appellant's counsel in their brief (p. 6–7) to throw doubt on the testimony of these witnesses, going even so far as to contend that the police officer was attempting to cover up a bungled investigation by perjury, is without persuasive

and his wife, the plaintiff, had shot it at home out of the back window, but she did not know he had carried it to his office. The pistol, with some unskillfully taken fingerprints of the deceased, was sent by the police, to the State prison at Raleigh, to S. B. Dorsey, Finger Print Expert. The finger print expert found only one print on the gun, and it was so blurred that he could not identify it. After communicating with the plaintiff, through Dr. and Mrs. Fleming, the coroner did not hold any formal inquest but filed his report, and the City Health Officer filed the death certificate.

The office safe was never locked, except a small compartment on the inside. Mrs. Lizzie Ward had been the doctor's office assistant and secretary for many years, and she posted the books each morning, they being kept in the unlocked safe. She never saw the doctor put any money in the safe. He made frequent bank deposits. When the body was found, the safe was found with the door open, and inside lock apartment was also open, and the drawer inside of it was resting on the top of the safe. Dr. Gorham had open upon his desk his account books, and income tax blanks, partially filled out. There was absolutely no evidence as to what was in the lock-compartment drawer. The defendant argued that it might have been the pistol that was in the drawer, but there was no evidence either way. (But see R. 353 Supp. 83.) Except for the safe being open, as stated, there was no suggestion of any disarray of the furniture or other articles either in the reception room where the doctor was found, or in any other room in the suite. Everything was calm and peaceful, no sign of any struggle. The windows being closed high above the street, no intruder could have entered except through one of the two doors which the doctor was facing, and an intruder would have been obliged to walk around the doctor from front to back and stand against the west wall to have shot him in the back

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effect when one considers that the plaintiff herself was in court throughout the trial and could have denied her husband's ownership of the pistol if such had been the fact. Doubtlessly, the fact that other of the bullets were found in the third drawer of the doctor's desk and turned over to her (R. 352–4, Def. Sup. 83) was a deterring consideration. And why should Dr. J. R. Norton, Professor of Public Health Administration at the Univ. of N. C. be interested in the reputation of the Rocky Mount Police Department, sufficiently to perjure himself?

of the head. There was not the slightest evidence of any opportunity for homicide. Besides there being no evidence that anything of value was taken from the office or from the safe, there was the evidence of the undertaker that he found the doctor's watch and money untouched in his pockets, and that he turned them over to the doctor's brother. There was not even a suggestion, either in evidence or in argument, that any one ever bore any illwill toward Dr. Gorham. He had never had an altercation or dispute with any one, according to the evidence. He was a quiet, gentle soul, very reserved, and the sort that kept his troubles to himself. Under the *Frankel* and the *Stone cases,* above cited, the plaintiff signally failed to carry the burden which she assumed in her complaint of showing opportunity or motive for assassination.

Dr. Gorham had made his will on February 9, 1933, less than thirty days before he was found dead. (R. 288 Deft. Supp. 64) Of the net value of his estate of $22-500.00, there was $14,000.00 of life insurance payable to his estate, in addition to a $2500.00 policy payable to his wife. (R. 288 Supp. 64). The plaintiff qualified as co-executor under her husband's will, and with the co-executor she filed claims for the insurance payable to the estate, on March 21, 1933, with the Maryland Life Insurance Company, of Baltimore, Atlantic Life Insurance Company, of Richmond, and the Mutual Benefit Life Insurance Company, of Newark, N. J., in which claims the cause of death was stated to be suicide. (Defendant's exhibits b, c, and d, R. 477 to 482, Supp. 97-102 inclusive.) On the same day, March 21, 1933, plaintiff filed claim in her own behalf alone with Pilot Life Insurance Company for the $2500.00 policy payable to her, stating the cause of death as suicide. (Defendant's exhibit A, R, 476, Supp. 97.) There was evidence that the co-executor prepared the three proofs on the policies payable to the estate, and that plaintiff signed them without reading them, but this evidence did not apply to the Pilot Life Insurance Company policy in which the co-executor had no interest. It stands in the record as an unqualified admission by the plaintiff that her husband died by suicide.

Mrs. Gorham had a post-mortem examination made of her husband's body, beginning August 28, 1934. (Evidence Dr. W. D. Forbus, (R. pages 113, Supp. 22 et seq.)

APPENDIX

Dr. Forbus made his final report to Mrs. Gorham on October 6, 1934. (R. 148, Supp. 39). He explained to her as he did on the witness stand that his position was that of a disinterested investigator (R. 150, middle, Supp. 40) and that his finding was that Dr. Gorham died as the result of a contact pistol shot wound. He gave as his reasons:

1. "There was no branding as far as I was able to determine. The condition of the wound on the outside of the skull was such, however, that a brand might not have been seen had it been there." (R. 123, Defendant's Supp. 27-28).

2. "It was a ragged wound of the nature of a tear, as well as of a perforation." (R. 124, Defendant's Supp. 28).

3. "There was smutting. There was a black discoloration around the margin of the wound which could be wiped away." (R. 124, Def. Supp. 28).

4. "There was no tattooing or pitting of unburned powder on the surface of the skin around the margin of the wounds." (R. 124, Def. Supp. 28).

5. "The entire interior of the wound was blackened and smutty and discolored." (R. 124. Def. Supp. 28). also charred (R. 139 Def. Supp. 35).

6. The bullet made a wound of a larger size on the inside of the skull, than on the outside. (R. 125. Def. Supp. 28).

7. "The margins of this wound in the bone were blackened and contained black granules of gritty material." (R. 125. Def. Supp. 29).

8. "The skull was so extensively fractured in many places that it was easy to remove it from the neck, merely by lifting it off, without any extensive sawing operation, which is usually required for that purpose." (R. 125. Def. Supp. 29).

9. The bullet made a straight line of injury to the brain from where it started to where it lodged (Supp. 29) and the "microscopic studies and the chemical determinations which I made showed that partially burned unconsumed powder was situated at a point just beneath the position at which I found the bullet on the left side of the

brain, and in addition all along the course of travel of the bullet from the point of entry to the attempted point of attempted exit." (R. 126. Def. Supp. 30).

10. The weight of the bullet and the character of the wounds were consistent with the usual type of pistol of .32 caliber. (Supp. 31). The pistol in this case was an Iver-Johnson .32.

11. "The wound was about a half inch in diameter, generally speaking round or oval." (R. 125. Def. Supp. 28).

From these findings Dr. Forbus concluded that the shot was fired from contact or near contact." (R. 134. Def. Supp. 32).

The contact theory alone could explain the following facts:

2. That the wound was ragged.

11. That the wound was larger than the bullet.

6. That the wound was larger on the inner layer of the skull than on the outer.

5. That the entire interior of the wound was blackened and smutty and discolored; also charred.

7. That in the margin of the wound were found black granules of gritty material.

8. That the extensive fracturing of the skull was from explosion of gases inside.

9. The presence of partially burned, unconsumed powder from the point of entry throughout the course of travel of the bullet from the right hemisphere through the left hemisphere of the brain, also just beneath the position at which the bullet was found.

A distant shot would have left a round hole just the size of a .32 bullet. This wound was half an inch in diameter, and was ragged. The cursory observation of the undertaker, Mr. Gay, and policeman, Stephenson, that it was a clean wound, must be weighed in accordance with their opportunity and their interest and their lack of technical qualifications. Their observation and their recollection of the condition of the wound after six years cannot be held to contradict the evidence of an expert, competent pathologist who examined the wound in a carefully executed post-mortem operation. Besides, the un-

dertaker said that by clean, he meant well-washed. (R. 25, Supp. 8). Neither of them estimated the size of the wound, as against the calipers measurements applied by Dr. Forbus.

A distant shot would not have broken away a larger hole on the inside layer of the skull than on the outer layer. It was the explosion which did this particular damage, not the bullet.

The black material in the interior of the wound, the charring of the inner margin of the wound, the presence of powder residue throughout the course of the bullet, a distance of about six inches, through both hemispheres of the brain, can be explained on no other theory whatsoever except a shot in close contact with the skull. A shot from more than a half inch distance would not burn the inside of the wound. (Plaintiff's witness Carpenter, R. 435, Ptfs. Appendix, 97; R. 441, Deft. Supp. 91; R. 443, Deft. Supp. 92 and 94). Both Dr. Forbus and Dr. Carpenter said without any quibbling, that only a wound at contact, or near contact, could "produce a result in which portions of unignited powder were carried into the wound and into the remote portion of the brain". (Supp. 91, R. 441, and Supp. 94, R. 450).

There were other findings which were consistent with the theory of a contact or near contact shot, but which were also consistent with a shot at a longer range. Finding No. 3, of smutting that could be wiped away, was consistent with a shot up to several inches. Finding No. 4, that there was no tattooing or stippling or pitting on the surface of the skin, is consistent either with a contact shot or with one from some distance away. Tattooing is produced by firing at relatively close range, but not by a remote shot, or by a contact shot. A remote shot permits the powder to be consumed before striking the surface, and a contact shot propels the entire contents of the cartridge into the inside of wound. Finding No. 1, that there was no brand, is consistent with a shot at absolute contact, which would confine all burning to the interior of the wound, or with a shot fired so far away that the flames would burn themselves out before striking the surface. Dr. Forbus found the brand on the inside of this wound, but none on the outside. The wound had been stuffed with cotton by the undertaker, and the

body had been interred for fourteen months before the autopsy, and Dr. Forbus testified that the condition of the wound was such that a brand might not have been seen had it been there.

The fact that some of the findings may be explained as consistent either with a distant shot, or a contact shot, in no way detracts from the irresistible force of those findings which cannot be explained otherwise than by a shot at contact or near contact.

Be it remembered that the plaintiff selected Dr. Forbus as a competent pathologist to do the post mortem on her husband, to ascertain the cause of his death. When his findings, which were communicated to her in August, 1934, and again in October, 1934 were not favorable to her cause, and the case came on for trial, she selected another pathologist, Dr. C. C. Carpenter, and produced him as an expert witness. He himself testified that Dr. Forbus was a competent pathologist.

In connection with Dr. Carpenter's testimony, upon which the plaintiff relies, it must be pointed out that he never saw the body of Dr. Gorham, or any part of it. It is in evidence, and uncontradicted by the plaintiff that on August 21, 1934, upon Mrs. Gorham's instructions, Dr. Forbus turned over to Dr. W. T. Oliver the calvarium (skull) removed from Dr. Louis R. Gorham, and the bullet (R. 144 Deft. Supp. 37); that Mrs. Gorham took this material to Washington about two days later with Dr. Oliver, to get Lieut. Fowler's opinion as a ballistic expert. (R. 348. Deft. Supp. 81); that after returning from Washington, upon instruction of Mrs. Gorham these materials were placed in the vault of the Peoples Bank & Trust Company by Dr. Oliver, who has not seen them since. (R. 349. Deft. Supp. 82); that Dr. Forbus removed the entire brain (Supp. 36) that on October 11, 1934, he delivered to Mrs. Gorham the brain and the portion of the scalp showing the wound of entry. (R. 143, Deft. Supp. 37). Mrs. Gorham did not testify at the trial, and has never explained why she did not deliver the calvarium, the brain, and the material portion of the scalp to Dr. Carpenter. He testified that "obviously the best material I could have had would be the actual material in question," and that he "suggested that it be put at his disposal, and it was not put at his disposal". (R. 435,

436. Deft. Supp. 90-91). So in reading Dr. Carpenter's testimony it should be remembered that the plaintiff had available to him first-hand data and that no explanation has been made as to why that material was not placed at his disposal. He criticized Dr. Forbus' technique and he attempted to question the findings, purely upon the testimony which Dr. Forbus gave in this case and in another suit against another company, in another court. The whole performance by Dr. Carpenter may be accurately characterized as an attempt on his part to tell the jury that they should not give too much weight to Dr. Forbus' testimony; that is, to substitute himself for the jury.

In the role to which he was assigned, he felt himself obliged to say that Dr. Forbus was a good pathologist (R. 441. Deft. Supp. 91); that if Dr. Forbus found unignited powder carried into the wound and into the remote portion of the brain, it was his opinion that the revolver was fired at contact or near contact. (R. 441, 442, 443. Deft. Supp. 91-92). He also said that he "did not hear that testimony" that the wound was seared and burned inside the orifice, but if the jury so found, in his opinion the shot was fired at contact or near contact. (R. 443-444. Deft. Supp. 92). Although Dr. Carpenter "did not hear" Dr. Forbus say that there was charring inside the wound, the record shows that Dr. Forbus did say that very thing. "Were the tissues inside Dr. Gorham's head charred or burned by the flame? Yes, sir." (R. 139. Deft. Supp. 35). Dr. Carpenter also attempted to argue that the powder residue which Dr. Forbus found was possibly not powder residue, but something that looked like it, because he said Dr. Forbus did not speak with certainty. (Ptf. Append. 102). But he said (R. 461, Deft. Supp. 97) that a compentent pathologist can identify powder residue by microscopic and chemical analyses. Dr. Forbus testified that he subjected the material to both microscopic and chemical analyses, and that these "showed partially burned unconsumed powder" all along the course of the bullet. (R. 126. Deft. Supp. 30). This testimony was given on Monday afternoon (R. 142, bottom) and Dr. Carpenter was not in the court room at that time. (R. 442, Ptf. Append. 97). Dr. Carpenter took the *photograph* which Dr. Forbus said represented the gritty material all along the course of the bullet, and attempted to point out

to the jury that the black substance in question might *possibly* be the result of decomposition (of brain tissue!). Plaintiff so argues in her brief p. 29.

Dr. Carpenter also contended that in order to leave no brand and no powder tatoo, and no burned hair, the shot must have been from a considerable distance away, or at absolute contact between the barrel of the gun and the scalp and all points; that a near contact shot or partial contact would have left these signs on the exterior of the wound. (Dr. Forbus testified that the condition of the body after fourteen months was such that a brand and burned hair might have disappeared.) Dr. Carpenter further contended that to lodge the bullet where Dr. Forbus found it from the point of entrance, it would have been impossible for the gun to have been held in absolute contact with the scalp at all points. He contended that a shot at absolute contact would have caused the bullet to come out behind the left ear. (R. 427. Ptf. Append. 90, near top.) (Compare *Sawyer* vs. *Mutual Benefit Health & Accident Association, infra,* where the pistol bullet entered by contact shot back of the right ear, and emerged *in front* of the left ear.) Dr. Carpenter was then asked to demonstrate on the colored man Will Pittman, and the demonstration showed that absolute contact would bring the bullet out, not *behind the left ear, but in front of it.* (R. 441. Ptf. Append. 96.) Dr. Forbus was asked by Gov. Ehringhaus to demonstrate how the shot could have been self-inflicted at absolute contact, with the very pistol which Dr. Gorham used. The record speaks.

> "Witness stands immediately in front of the jury box and repeats the demonstration with the revolver.
>
> "THE COURT: Can you pull that trigger there?
> "THE WITNESS: Yes, Sir.
> "THE COURT: Go head and do it.
> The WITNESS pulls the trigger of the revolver."
> (R. 199-200. Deft. Supp. 46).

There was absolutely no proof that Will Pittman had a head which would exactly conform to the skull of Dr. Gorham. But aside from that, the demonstration in the court room proved that Dr. Carpenter was giving an arbitrary opinion which had no probative value whatsoever.

In appraising Dr. Carpenter's opinions, too much importance cannot be given to the fact that Mrs. Gorham was

in the court room; that neither she nor any one else ever explained why Dr. Gorham's skull and brain and the portion of the scalp involved were not submitted to Dr. Carpenter as the basis of his testimony. The last heard of these materials, they were in Mrs. Gorham's possession. With them, Dr. Carpenter might have had some basis for attempting to contradict the findings of Dr. Forbus. The powder residue still lies along the course of the bullet in Dr. Gorham's brain, and it it were not powder residue, Dr. Carpenter, as a competent pathologist could have determined that fact. But he was forced to testify only upon the data submitted in Dr. Forbus' testimony, and he was obliged to resort to mere possibilities and guesses, and to argument, instead of facts.

This is not the first time that unsupported opinions of medical experts have been disregarded by the courts. In the Clemmer case, from this circuit, there was medical evidence of this character, opinions of medical men that Clemmer could not have shot himself. The opinion of Judge Soper deals with this kind of testimony. "They said in effect that it was not possible for the insured to have intentionally shot himself and still remain in the position in which he was seated upon the bed. We find ourselves unable to give weight to this reason." (79 Fed. 2nd. 724, top page 728.) And in *Thigpen* vs. *Ins. Co.* 204 N. C. 551, the evidence of medical men in that Thigpen was not capable, either mentally or physically, of engaging in any employment for gain or profit, had no probative value, in view of the fact that Thigpen had a job as court-crier. As said by the 8th Circuit in *Ocean Accident & Guarantee Corp.* vs. *Moore,* 85 Fed. 2nd 369, at page 375.

> Under these simple undisputed facts, we think the opinion of this witness is opposed to physical facts, scientific principles, and common knowledge, and we conclude that on this vital issue there is no substantial evidence to sustain the verdict of the jury."

Furthermore the burden of proof was upon the plaintiff, and not upon the defendant. It does not serve that Dr. Carpenter thought that Dr. Forbus might possibly be wrong in his finding of unexploded powder throughout the course of the bullet. Dr. Carpenter submitted no evidence whatsoever to the contrary. A reading of Dr. Forbus' tes-

timony convinces any one that he was as certain as a scientist can be, that what he found was unexploded powder. He was as certain as any one can be that the fractures in the skull which enabled him to remove it from the neck, without extensive sawing, were due to explosion of gases inside the head. Dr. Carpenter did not attempt by innuendo to cast any doubt upon that finding. These were the signs which could not disappear in a fourteen months interment. The things Dr. Carpenter complained principally about were the external signs, which could disappear, and there is nothing in any of Dr. Carpenter's vagaries of opinion which are inconsistent with a shot from either contact or near contact.

The conditions which produced in Dr. Gorham that state of mental confusion, and desire to escape the difficulties of life through suicide, are not now susceptible of definite proof. There is however in the evidence definite proof that he was in such a state of mind and there are also definite indications as to at least some of the causes.

Mrs. Lizzie E. Ward testified (R. 254-271, Defendant's Sup. p. 57) that she had been his assistant for more than five years; that he was an even tempered man but toward the end had gotten very restless and nervous; that he was worried over his wife's health; that on two occasions she called him on the telephone and he left the office and went home to her when he had a patient sitting in the dental chair; that he was worried over poor collections; that some months before he died he cut her (Mrs. Ward's) salary from $50 to $35 per month and that she stayed on because she knew he needed her; that on the day before he died he did not go home for lunch, which was very unusual; that he was working on his account books and his income tax; that in the afternoon Mr. Zeno Mann, a valued patient of many years standing, had a minor treatment and Dr. Gorham asked for his fee while Mr. Mann was still in the chair, which created quite a disturbance; that the last thing the Doctor said to her when she left on that night was "Mrs. Ward I don't know what is going to happen. We may have to close shop." (R. 261, Sup. p. 60).

Mrs. M. P. J. Williams testified (R. 251-253, Sup. p. 55-56) that she had dental work done that last day and noticed that Dr. Gorham was very nervous and rough with his work and that the Doctor told her that "it looked like

his property was going to be taken for taxes" and that she had never seen him blue and depressed before.

E. C. Smith testified (R. 335-341, Sup. p. 76) that the Doctor was worried about his collections and that on one occasion not long before his death they were talking of this in the presence of Mrs. Gorham and she said: "Yes, we are having to live off the rent we get from my rooms," to which Dr. Gorham made no reply. (R. 338, Sup. p. 77).

Dr. M. I. Fleming testified (R. 212-219, Sup. p. 48) that his wife was related to Mrs. Gorham and that he and Dr. Gorham were the best of friends and that Dr. Gorham was unusually depressed for about ten days before his death, acted peculiarly in a golf game and that on the last day, while eating a lunch in a drug store, which he had never done before, he made a remark to Dr. Fleming which had little, if any, meaning to it, which greatly impressed his friend.

Plaintiff's rebuttal witness, Mrs. W. M. Daughtridge (R. 400-401, Sup. p. 89-90) testified on cross-examination that Dr. Gorham had been terribly hurt by the death of a favorite child some years ago, and that he was worried about his wife's health and asked her to try to get Mrs. Gorham out in the sunshine and with people because he felt his wife was alone too much.

Taking all this evidence in connection with evidence that Mrs. Gorham, although highly intelligent and apparently devoted to her husband and family, was a very high strung, nervous woman, always determined to carry her point, we begin to see that Dr. Gorham lived in an atmosphere of nervous tension and that this probably caused him to greatly exaggerate his financial and domestic strains.

The evidence of S. B. Dorsey, the finger-print expert, throws no light upon the identity of the person who discharged the pistol. The plaintiff contends that the failure of the pistol to exhibit the finger-print of Dr. Gorham is evidence that another person was involved. E. L. Stephenson, police officer, testified he did not know how to take a dead man's finger prints and that his prints were not good. His failure to get good finger prints was unimportant because the finger print expert found the single print upon a gun so smeared that he could not have identified it even if he had had a perfect finger-print from Dr. Gorham's body. (R. 356-356½, Ptf. Appdx. p. 74). This

evidence is perfectly consistent with the theory of suicide. In the noted prosecution of James J. Hines in New York City, by Thomas E. Dewey, a state's witness committed suicide during the second trial. Hines lawyer contended that the witness had not committed suicide but had been murdered because the deceased's finger prints had not been found. Mr. Dewey, in his reply, dealt a blow at all fictional writers who have encouraged the belief that finger-prints on the revolver always betray the murderer. He said: "In the past 20 years the New York police in only one instance have found finger prints on revolvers used in murders or suicides." A police expert testified that "It's the way a person grabs a gun that makes finger prints undetectable. It is held in the palm of the hand and the metal or rubber grip seldom retains any sort of impression." (Liberty Magazine, Dec. 16, 1939, page 52, article by Rupert Hughes on the "Life Story of Thomas E. Dewey). This is but common knowledge.

After the pistol slipped out of Dr. Gorham's inert hand the print on the gun was smeared. Nothing can be made out of the finger print business for either side.

On this issue of accidental death through homicide as opposed to the theory of suicide the plaintiff, by her pleadings, by her evidence, and by the theory on which the case was tried, made the proof of a distant shot the bed rock and essential element of her case *and assumed the burden of proof*. By the pleadings, the evidence, and the theory of the case, it seems to be conceded that if the shot was fired from contact or near contact the plaintiff is not entitled to recover. The autopsy clearly indicates that the shot was from contact or near contact and it is unnecessary to discuss any further the circumstances surrounding this unfortunate death.

THE LAW APPLICABLE TO THIS PHASE OF THIS CASE

If the policy in suit were a life insurance policy and if the plaintiff's evidence itself did not show suicide, but that fact appeared only from the defendant's evidence, a verdict should have been directed for the defendant, because although suicide would have been an affirmative defense, there was nothing in the plaintiff's evidence in conflict with it. *Spruill* vs. *Ins. Co.*, 120 N. C. 141; *Hedgecock* vs.

Ins. Co., 212 N. C. 638 at 641; *Bessire* vs. *Ward,* 209 N. C. 266; *Lightner* vs. *Knights of King Solomon,* 199 N. C. 25.

But this was not a life insurance policy. It insured only against death by accidental means. Therefore, the burden to bring the case within the coverage of the policy was upon the plaintiff. *King* vs. *Ins. Co.,* 197 N. C. 566 at 568; *Harris* vs. *Ins. Co.,* 204 N. C. 385; *Maheffey* vs. *Ins. Co.,* 205 N. C. 701; *Scott* vs. *Ins. Co.,* 208 N. C. 160; *Jefferson Standard Life Ins.* vs. *Clemmer,* (C. C. A. 4th 1935) 79 Fed. 2d 724 at 731; 103 A. L. R. 171 and note at 179; *Del Vecchio* vs. *Bowers,* 296 U. S. 280; 80 L. ed. 229; *N. Y. Life* vs. *Gamer,* 303 U. S. 161, 82 L. ed 726; 114 A. L. R. 1218; *Home Life Ins.* vs. *Moon,* (4th C. C. A. 3-11-40) 110 Fed. 2d 184; *Scales* vs. *Prudential Ins. Co.,* (5th circ. 1-25-40) 109 Fed. 2d, 119.

If violent death without any explanation had been shown, the plaintiff would have had the aid of the presumption against self destruction to carry the case to the jury. *Del Vecchio* vs. *Bowers, New York Life* vs. *Gamer, supra.* In those cases, opposing inferences might be drawn from the evidence. In the Gamer case the evidence tended to show accident more than it did suicide, and the question was for the jury. There the insured was found dead from a gun shot wound immediately after going upstairs into a narrow closet filled with clothing, to get his gun to go hunting. But in that case there was some evidence to show suicide as an explanation of the death so the court held that the presumption against suicide as a rule of law had disappeared from the case, and the plaintiff had to get along without its aid. That case was again tried in the Federal Court in Montana when for the first time the beneficiary brought to the Court's attention sections 10600 and 10606 of the Revised Code of Montana, 1935, which provided a statutory presumption of accidental death and that such a presumption does not disappear when there is enough evidence to support a finding adverse to it, but remains in the case "as indirect evidence." On appeal from judgment for the beneficiary, *New York Life* vs. *Gamer,* (9th Cir.) 106 Fed. 2d 375 (cert. den. Dec. 11, 1939, 84 L. ed. Adv. Op. 249), the judgment was affirmed on the ground that the Federal Court was bound by the statutes of Montana. ***There is no such statute relating to presumptions and their effect as evidence in North Carolina.***

Another case where opposing inferences might be drawn from the evidence is cited and much relied upon by the plaintiff. In *Columbian National Life* vs. *Comfort,* (8th Cir.) 84 Fed. 2d 291, the case was put to the jury on evidence that the deceased during a card game in the evening went to a bedroom to secure a new pack of playing cards from the top shelf of a narrow closet where a revolver and a mass of other things were piled up; that the revolver was in such rusty gummed-up condition, with respect to the safety catch, that it would be discharged "if jarred in any manner"; that insured did not take the revolver with him but it was present with the cards which he was in search of; that the floor was slippery and light dim; that the body was found lacerated and bruised from the fall and "playing cards were observed on the floor"; that there was a conflict of medical opinion based *solely on the external appearance of the wound* as to whether the shot which entered the right temple in front of the ear was fired from near contact or from 12 to 15 inches away. *The medical evidence did not disclose any signs of internal explosion of gases in the head or any unexploded powder residue in the brain.* Semble, that if a shot from contact or near contact had been established, verdict would have been directed for insurer.

But where there is evidence tending to show suicide and no substantial evidence to show the contrary, the case should be dismissed as a matter of law because the plaintiff has nothing to rely upon but the presumption and it has disappeared. Where the evidence points to suicide and there is no substantial contradiction in it the court directs a verdict for the defendant. *Jefferson Standard* vs. *Clemmer* and *Home Life* vs. *Moon,* supra. In *Scales* vs. *Prudential Ins. Co.,* 109 Fed. 2d 119, it is said:

> Where plaintiff, having the burden to show that the death was accidental, by the introduction of evidence supporting a consistent and reasonable theory of accident, shows merely that the death was self-inflicted, without showing any circumstances of the self-infliction consistent with a reasonable theory of accident . . . the presumption against suicide has no place. However, if plaintiff presents evidence consistent with a reasonable theory of accidental death, she is entitled to go to the jury because she has done

so and not because of any presumption in her favor. On the other hand, if her evidence as here, shows no more than that the deceased's death was self-inflicted and fails to present a reasonable theory of accidental death, she has failed to make out a jury case because she has failed to discharge the burden imposed upon her, of showing accidental death. 'Suicide' at least when sane is not accidental. Plaintiff under this policy has the burden of proving an accidental death, thereby negativing suicide."

In *Sawyer* vs. *Mutual Benefit Health & Accident,* decided in 1931 (121 Neb. 504, 237 N. W. 615) the head note is

"(1) The presumption against self-destruction prevails where the evidence shows that death was caused by violence and does not tend to prove suicide. (2) The presumption against self-destruction is overcome where evidence has been introduced tending to show suicidal death."

The court affirmed the judgment dismissing the action on the ground stated in paragraph 2. The suit was on an accident policy. The insured died of a pistol shot wound which the medical evidence indicated was a contact shot which entered the head back of the right ear and emerged slightly to the front and above the left ear. The pistol was lying by his side a few inches from his right hand. It belonged to the insured. There were other circumstances pointing to the absence of suicidal *intent* but the court held the facts, circumstances of the death, the position of the body, and nature of the wound and the absence of evidence of the presence of any other person, reasonably explained the death as suicide, and that any other finding would be a pure guess. The evidence tending to provide suicide in the case at bar is much stronger than it was in the Sawyer case.

See also *Boggan* vs. *Provident Life & Accident Ins. Co.* (5th Cir.) 79 Fed. 2d 721, and the Wilkes case 76 Fed. 2d 701; and *McMillan* vs. *General American Life Ins. Co.,* decided May 22, 1940—South Carolina—an action on life insurance policy containing an *exception* as to suicide within a year. The Supreme Court of S. C. held that verdict of suicide should have been *directed for defendant,*

notwithstanding conflicting *theories* of experts as to possibilities, and notwithstanding uncontradicted evidence of deceased's favorable domestic and financial situation.

The cases principally relied upon by the plaintiff are *Columbian National Ins.* vs. *Comfort* (8th Cir.), *supra,* which is an authority for the defendant, and three cases all from the 7th Circuit, in which two of the opinions were written by Judge Alschuler, towit, *Missouri State Life* vs. *Pater* (7th Cir. 1926), 15 Fed. 2d 737; *Metropolitan Life Ins.* vs. *Hogan* (7th Cir. 1933), 62 Fed. 2d 135 and 63 Fed. 2d 654, and *New York Life* vs. *Melgard* (7th Cir. 1935), 74 Fed. 2d 489. In the *Clemmer case,* 79 Fed. 2d 724 at 728 Judge Soper, speaking for this circuit, cited the Hogan case and placed the 7th Circuit in the group of courts which erroneously held that on a conflict of evidence between suicide and accident "the weight of the presumption treating it as an inference of fact is added to" the evidence tending to show accident. This theory is definitely discarded in the 4th Circuit by the Clemmer case.

Judge Alschuler's opinion in the Pater case is short and upon the evidence recited seems clearly erroneous. He paramounts the absence of a suicide motive, which under the general rules is not inconsistent with the finding of suicide. If this rule were adopted, the rule of the Clemmer case would be wiped out. In the Melgard case even the 7th Circuit by the same Judge says:

> "To be sure suicide may so definitely appear that the existence or absence of a motive therefor would have no definite influence upon the ultimate conclusion" (p. 489).

We do not attempt to justify the decision in the Pater case. It would not have been so decided in this Circuit.

The Hogan case was decided in 1933 by 7th Circuit in accordance with the rule which was disapproved in the Clemmer case. Judge Sparks held (p. 655): "The presumption is that the death was not self-inflicted. That presumption together with the pertinent circumstances surrounding the death presented a question of fact which was properly submitted to the jury." The Hogan case is therefore distinctly discredited.

The remaining case, Melgard, is subject to the same criticism. There the Judge charged that "the law raises a

strong presumption" that the death was not due to suicide (p. 491). The court held that this charge was correct except for the use of the word "strong" and exceptions to that error had not been properly preserved.

In *Hill* vs. *Insurance Co.*, 150 N. C. 1—Suit was upon a policy covering accidental death, with an exemption from liability if the insured was killed while leaving a moving conveyance. Clark, C. J., for the court, held that when the *defendant* introduced a sworn statement made by the plaintiff accompanied by another sworn statement which the plaintiff had never seen, showing that death occurred while insured was leaving a moving train "the plaintiff must show that there was error as to the fact, not merely that he had relied upon hearsay statements . . . The facts therein stated as to the cause of death are true as against him unless he shows mistake." In that case the plaintiff was nonsuited.

The plaintiff concedes (her brief P. 10) that the true rule as to the function of the presumption against suicide, and as to the burden of proof is that laid down in the Clemmer case, and it is the North Carolina rule. She could hardly do otherwise, since she relies upon *Wharton* vs. *Insurance Co.*, 178 N. C. 135, and *Gorham* vs. *Ins. Co.*, 214 N. C. 526 (215 N. C. 195). In the Wharton case the question only "lurked in the record" and was not decided. (*N. Y. Life* vs. *Gamer*, 106 Fed. 2d 375). In the Gorham case the question was presented but not decided,[1] and *Warren* vs. *Ins. Co.*, 215 N. C. 402 (Apr. 12, 1939)

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[1] In the argument upon the motion for a directed verdict in the District Court, Judge Meekins inquired what evidence induced Judge R. H. Parker, the trial judge in the Pacific Mutual case, to rule that there was sufficient evidence of death by accidental means to go to the jury, and stated that such a ruling by Judge R. H. Parker would be persuasive with him. The Supreme Court in its opinion indicated that Judge R. H. Parker had so ruled and that defendant had acquiesced in the ruling. In the argument defendants' counsel read to Judge Meekins from the Supreme Court record of the petition to re-hear a statement by Judge R. H. Parker as to what occurred in the trial over which he presided, in support of defendant's contention that Judge Parker had ruled that the evidence was not sufficient. If Judge Meekins was interested in what occurred below in the other court, the Circuit Court of Appeals may also be interested. For that reason we have filed with the Clerk the printed record of the petition to re-hear, which contains on pp. 18-26 Judge R. H. Parker's statement.

stated the rule of the Clemmer case and cited the Clemmer case with approval.

In directing the verdict for the defendant the District Judge did what this court did in *Home Life* vs. *Moon* (Mch. 11, 1940), 110 Fed. 2d 184, where the court said (p. 186):

> "Counsel for both sides appear to agree that the insurance policies herein sued upon were West Va. contracts and that (under *Erie R. R.* vs. *Tompkins,* 304 U. S. 64) the *substantive* law of West Va. should govern. Many cases are cited as to the burden of proof or the duty of going forward with the evidence, or presumptions as to the death by accident or suicide," (citing W. Va. cases and from the 4th Circuit: Tabor vs. *Mutual Life,* 13 Fed. 2d 765, *Jefferson Standard* vs. *Clemmer,* 79 Fed. 2d 724, *Traveler's Ind. Co.* vs. *Plymouth,* 99 Fed. 2d 218, *American Nat'l Ins.* vs. *Bulch,* 10 Fed. 2d 48). "Under these cases and under *Rule* 50 of the Federal Rules of Civil Procedure . . . when we believe that the evidence justifies only one reasonable inference, that the insured's death was due to suicide, then we should remand the case to the District Court with directions to set aside the judgments in favor of the plaintiff, appellee, and to enter judgment (in each civil action) in favor of the defendant, appellant. We do so believe and we do so direct."

In deciding the Moon case the court was following the well established Federal rule that "if the evidence is of such a character that reasonable men, in a fair and impartial exercise of their judgment, may reach different conclusions, then the case should be submitted to the jury", otherwise not. *Nelson* vs. *Business Men's Assurance Co. of America,* 108 Fed. 2d 363-365 (7th Cir.).

Mutual Benefit Health & Accident Assoc. vs. *Snyder* (6th Cir. Feb. 7, 1940), 109 Fed. 2d 649, 472. In this case it was held that a directed verdict is warranted when (1) there is no substantial evidence, a scintilla being insufficient; (2) when there is no substantial contradiction of the evidence of the moving party; (3) where the evidence is undisputed, or though conflicting, "is so conclusive that the court would set aside a verdict to the contrary".

There is no difference between the law of North Carolina and the law of the Federal Courts, with respect to the effect of the presumption against suicide. When it disappears from this case there is not an iota of evidence to support the theory of homicide or other form of accidental death. Under either the state rule or the Federal rule the verdict was properly directed for the defendant.

The burden was not on the defendant to show suicide. But to find suicide, proof of motive was not required. *Love* vs. *New York Life,* 64 Fed. (2d) 829. Evidence of insured's favorable domestic or financial situation is not inconsistent with suicide. *Burkett* v. *New York Life,* 56 Fed. (2d) 105. No motive or opportunity for any one to murder Dr. Gorham was shown. *Frankel* vs. *New York Life,* 51 Fed. (2d) 936; *New York Life* vs. *Stone,* 80 Fed. (2d) 614.

Any theory other than suicide would be purely conjectural, or guess work, "piling possibility upon possibility". *Love* vs. *N. Y. Life, supra,* p. 832. Conjectural evidence will not sustain a verdict.

Gunning vs. *Cooley,* 281 U. S. 90, 74 L. Ed. 720; *Byrd* vs. *Express Co.,* 139 N. C. 273; *Kearns* vs. *R. R. Co.,* 139 N. C. 470, at top 472; *Lewis* vs. *Steamship Co.,* 132 N. C. 904; *Rice* vs. *R. R.,* 174 N. C. 268.

It must be remembered that the burden was on plaintiff to present sufficient evidence to go to the jury sustaining the allegation of homicide. Counsel's "Forty Points", generally speaking, are not evidence of homicide or accident; at the most they are merely arguments. Their speculative nature is indicated by repeated use of the word "possibility" in Counsel's summary of them. (Plaintiff's brief, page 38; Points 37, 38, 40 and 41.)

In their zeal, plaintiff's counsel have even slipped into error by distorting the meaning of some of the evidence, e. g., on page 29 of their brief, they say Dr. Forbus himself admitted that his analysis of the powder residue found in the brain was "uncertain". This is a distortion, an unwarranted interpretation of their cross examination. Deft. Supp., p. 44 and 45: "Q. Did you make a microscopic examination of this substance, whatever it was, that you removed from the wound? Ans. Yes, I did. * * * Q. Even then you could not be absolutely certain what it was? A. Not absolutely certain. *There were other tests.* Q. You made other tests of that? A. Yes, I did. Q. What

other tests did you make? A. I made certain chemical tests. Q. What chemical tests did you make? A. For the identification of unexploded powder. * * * I found as a result of these tests that the material which I removed from the point where the bullet lodged acted chemically like the material which one has left on a piece of glass when one ignites black powder." This evidence is referred to as showing that Dr. Forbus himself admitted that he was uncertain regarding the powder residue!

Again in plaintiff's brief, page 29, they say that the skull was "shattered". The only pathologist who ever examined the body did not so describe the condition. Dr. Forbus said (Deft. Supp. 29): "The skull was fractured in many places * * *. It was easy to remove the skull from the neck * * *." "If the gases and the bullet all go into the wound, then it is obvious that there will be produced an explosive effect inside the tissues. That was what I found in this case, as indicated, e. g., by the many fractures of the skull that I mentioned. * * *" (Defendant's supplement, p. 34.)

The plain import of this testimony is that the skull was fractured by internal explosions, rather than shattered by an external blow.

Also on page 29 of brief, plaintiff's counsel say that the witness Zimmerman testified that the remaining shells in the gun did not contain a black powder, but a nublend powder. Zimmerman said (Deft. Supp. 69) that nublend powder was an intermediate stage between old fashioned black powder and new smokeless powders; that nublend is "in the black class"; "That nublend powder leaves a blacker substance in the gun * * * has a smutty, dirty appearance * * * does not burn up as clear and clean as smokeless powder. There will be hard particles discharged from the gun that are not burned, * * * it makes a blacker, dirtier looking spot wherever it hits".

On page 34 of plaintiff's brief, Point 9, the plaintiff argues that a shot behind the right ear is "unheard of in cases of suicide". The Supreme Court of Nebraska heard of such a case in *Sawyer* vs. *Mutual Benefit Health & Accident Association*, 237 N. W. 615, decided in 1931; action dismissed. Medical evidence indicated: "A contact shot entering the head back of right ear."

On page 35 of plaintiff's brief, Point 16, counsel argued that the course of a bullet through the brain was "somewhat wobbly". Dr. Forbus testified (Deft.'s Supp. 29): "My examinations of the brain revealed a *straight line* of injury to the brain, which extended from the position of the wound on the right side, to the position in which I found the bullet on the left side". Further comment unnecessary.

On page 36 of plaintiff's brief, point 26, it is stated there was no "muzzle blast or irregularity about the wound". Dr. Forbus said (Deft. Supp. 28): "It was a ragged wound * * * as the projectile passed through the skull it made a wound of one size on the outside, and a wound of a second size larger on the inside. The margins of this wound were blackened and contained black granules of gritty material."

The plaintiff argued, page 33 of her brief, that the natural angle of a self-inflicted shot is upward, instead of downward. Counsel overlooked the well-known flexibility of the human neck.

Counsel asked the court to try this case on the alleged testimony of Officer Zimmerman in another case against another company, in another court, taken down in shorthand, then typed, then printed, which the witness in this trial said it was not a correct transcript of his evidence in the particulars mentioned. It is respectfully submitted that this is going pretty far afield.

On page 36, of plaintiff's brief, point 21, they say there is conflict in the testimony as to "whether the blood was immediately under the doctor's hand and the pistol away". On page 37, point 28, they argue a conflict as to whether the doctor's right hand was between his legs, or hanging down his right side. One witness said that after six years he seemed to recall that the hand was hanging down the right side; and all the others said it was hanging down between his legs. But every single one said that the pistol was immediately beneath his hand, and not in any blood; that the blood ran down across the back of the doctor's head and dripped on the desk, and thence dripped to the floor. There is no conflict in the testimony regarding these facts. The dripping from the head to the desk also explains

how a little blood was spattered upon the doctor's spectacles, which he always wore, and had on at the time of his death.

Counsel argued, page 34, point 6, that the doctor had just completed his annual income tax return. The executor said (Deft. Supp. 65, middle): "Q. Income tax blanks had not been completed? A. No, he was working on the duplicate copy of the 1932 return, in pencil figures."

Counsel produced Dr. Gorham's daybook for five days, showing that he charged an average of $22.40 for work done on those days, and that he collected on work previously done an average of $15.40 on each of those days. Counsel then added the collections of old accounts, with the charges for new work, together, and argued that his practice returned him over $40.00 per day, or $12,000.00 per year. As a matter of fact, by the same records, the collections amounted to $4,555.20 per year. This is immaterial (*Burkett* vs. *New York Life Insurance Company,* 56 Fed. (2d) 105), but the record should be kept straight. See testimony of Mrs. Ward, plaintiff's appendix, pages 56 and 57.

In addition to straining the evidence beyond any reasonable interpretation, counsel opened their argument, on page 9, with the most remarkable suggestion that the ruling of the District Judge against them on all points "gives clear indication of the philosophy which plaintiff encountered below, and is sufficient, *per se,* to suggest the probability of error". If the Circuit Court of Appeals does likewise, will counsel have the same opinion of this court? The only three judicial officers who have expressed themselves on the facts of this case, or similar facts in the other case, are Judge Meekins and Judge R. Hunt Parker, Judge of the Superior Court in the Pacific Mutual case, and Associate Justice Devin, of the North Carolina Supreme Court. Judge Meekins' ruling is now under review. Judge R. Hunt Parker decided the same way he did on *all points.* (See his statement in Petition to Rehear.) Judge Devin, in his dissenting opinion in 214 N. C., page 536, top, says: "A careful examination of all the evidence adduced at the trial leads me to the conclusion that there was no other reasonable hypothesis upon which to account for the death of the insured, but that it resulted from a wound self-inflicted. * * * To my mind it is a mani-

fest case of suicide, which the courts and everybody else should face, notwithstanding technical rules of legal procedure. * * *." This was the only expression of any member of the Supreme Court on this question.

THIRD QUESTION.

AS TO COMPLIANCE WITH POLICY PROVISIONS REQUIRING NOTICE AND PROOF OF LOSS:

(a) Did plaintiff furnish timely notice of death by accidental means?

(b) If not, did she give such notice as soon as reasonably possible?

(c) Did she furnish affirmative proof of loss before bringing her suit?

(d) In lieu of notice and proof given as soon as reasonably possible, was she excused from giving any notice, or from making any proof, by the conduct of the defendant amounting to a waiver of these requirements?

POLICY PROVISIONS.

(Deft. Supp. 106-108)

"Standard Provision No. 4: * * * In the event of accidental death, immediate notice thereof must be given to the Association."

"Standard Provision No. 5: * * * Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible."

"Standard Provision No. 6: The Association, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days of the receipt of such notice, the claimant shall be deemed to have complied with the requirement of this policy as to proof of loss upon sub-

mitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made."

"Standard Provision No. 7: Affirmative proof of loss must be furnished to the Association * * * within ninety days after the date of such loss."

"Standard Provision No. 9: All indemnities provided in this policy * * * will be paid within sixty days after receipt of due proof."

"Additional Provision (b): Strict compliance on the part of the insured and the beneficiary with all the provisions and agreements of this policy * * * is a condition precedent to recovery * * *."

PLEADINGS.

Plaintiff alleged in paragraph eight of her complaint (R., VI) that she had fully complied with all the requirements of the policy preliminary to bringing suit, and the answer to paragraph eight (R., IX) specifically pleaded the contrary, and set up her failure to comply with the policy provisions as to notice and proof of loss. The plaintiff did not file any reply, alleging that she was excused from compliance by incapacity to act, or setting up a waiver of these provisions by the defendant. She tendered an issue (No. 1) as to plaintiff's mental incapacity "at the time of the death of Dr. Gorham", and another (No. 2) as to notice as soon as reasonably possible. The Court declined to give No. 1 as not determinative, relating only to the time of Dr. Gorham's death, and did give No. 2, which covered the whole point.

On the question of waiver, the plaintiff tendered her issue No. 3, "Was defendant informed of the death of Dr. Gorham within ninety days of its occurrence and of the circumstances surrounding it?" And another, No. 6, "Did defendant, upon receipt of notice of claim by plaintiff, deny or disclaim liability under said policy?" The Court declined to submit these issues as evidential in form, and as unsupported by the evidence.

APPENDIX

FACTS SHOWN BY THE EVIDENCE.

Dr. Gorham was found dead on the morning of March 9, 1933. On September 5, 1934, Mrs. Gorham's attorney, I. T. Valentine, addressed the first communication from her to this defendant, in which he made demand for the payment of $7,500.00 on this policy, "by reason of the death of Dr. Gorham", and requested blanks for proof. (R., 464; Ptf. Appendix, 6.) This letter was attached to a deposition which the defendant had taken in its home office, and was removed from the deposition by the plaintiff, and introduced in evidence, but she did not introduce any part of the deposition, although it was available to her. On the letter appeared certain penciled notations, which were not explained, either by the plaintiff, who had the burden of proof, or by the defendant. However, it is apparent that the figures "360-2783" are the numbers of this policy. The other figures, "520-1711-L-4-1-32, and 520-1661, F-C End. (full coverage endorsement), refer to two older policies which Dr. Gorham had allowed to lapse, taking the present policy in place of them on April 1, 1932. The remaining notation "Suicide, 3-15-33. G. W." would seem to indicate, although there was no proof, that some clerk in the defendant's office received information from some source undisclosed that Dr. Gorham committed suicide on March 15, 1933. The deposition from which the letter was taken by the plaintiff was made on April 2, 1936, and there is nothing in the record to indicate who made the notation, or when it was made, except that it was prior to April 2, 1936. In response to Valentine's letter of September 5, 1934, the defendant wrote, on September 14, 1934 (R., 466; Ptf. App. 7) that the policy had not been in force since April 1, 1933, and "if Dr. Gorham died before that time, it is apparent that no notice or proofs of loss have been furnished within the time fixed by the terms of the contract, and no reasonable opportunity has been had to investigate the matter, consequently we could not waive these conditions in the contract and furnish blanks for the purpose of considering the claim on its merits. * * * If our records are in error with reference to this contract, we will appreciate your advising us of the error." (This is the *"denial on the merits"* which plaintiff's brief, p. 8, refers to.)

No further communication was addressed by the plaintiff to the defendant, until summons was issued in the first suit, February 25, 1935. The complaint filed was the first statement by the plaintiff that Dr. Gorham died by accidental means, within the coverage of the policy, or even what day he died. The defendant, prior to the beginning of suit on February 25, 1935, made no investigation of the claim.

To excuse the plaintiff's noncompliance with these provisions as to notice and proof, the plaintiff relied upon the evidence of her daughter, Miss Josephine Gorham, and a physician, Dr. R. H. Speight (Ptf. App. 12 and 15), to the effect that in their opinion, from May 18, 1933, until the plaintiff had an operation for a fibroid tumor of the uterus in April, 1935, the plaintiff was mentally incapable of understanding any contract, or of transacting any form of business. It was in evidence that the plaintiff was treated at the State Hospital in Raleigh for drug addition[3] from May 18, 1933, to August 18, 1933, when she was released, as cured, on probation until May 18, 1934, when she was completely discharged without having re-entered the hospital. The plaintiff produced one lay-witness (John S. Dozier (Ptf. App. 82), who gave his opinion that plaintiff was not in a "normal condition", and a second, Mrs. Rosenbloom (R., 383), who said she was "not capable". This was the extent of the plaintiff's evidence on this point.

Defendant produced fourteen witnesses to the contrary, including Dr. Julian W. Ashby, Supt. of State Hospital, who testified that plaintiff was never insane, or suffering from anything but drug addiction, which was cured. Most of defendant's witnesses were acquainted with Mrs. Gorham's business activities between the death of her husband and the filing of this suit. She filed proofs of loss on four policies of life insurance; three payable to the estate, and one to herself. She qualified as co-executor of her husband's estate. She signed a series of deeds dividing up family property. She purchased a new automobile. But

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[3] R. 235, 237, Deft. Supp. 53. Plaintiff tried to show that in a former trial in another case, Dr. Ashby had said "drug addictional psychosis." That record showed he said that, and that it meant "due to over-indulgence in drugs and not to a mental illness." (Plffs. App. 79 top). On this trial Dr. Ashby said that he had testified "drug addiction without psychosis."

all of this is unimportant when compared to what she did in preparation for bringing this law suit. The evidence of E. C. Smith (R., 335; Deft. Supp. 77-78), W. S. Wilkinson, Jr. (R., 342; Deft. Supp. 78-79), and T. T. Thorne (R., 354; Deft. Supp. 84), was that she consulted three lawyers regarding this accident insurance, in the spring of 1933, about September 1, 1933, and in 1934. On September 1, 1933 (R., 341; Supp. 78), she was arguing her case against the theory of suicide, on the same ground that she now urges. She was complaining about not being able to get lawyers in Rocky Mount to take her case (R., 340; Deft. Supp. 77).

In addition to seeking out lawyers to bring her suit on this accident policy, and another against the Pacific Mutual Life Insurance Company, there is other evidence indicating that she had mental capacity to understand the policy contract and to act in accordance therewith. Before finally employing her attorney, I. T. Valentine, to make demand on the defendant and bring suit, she went to Duke University to see Dr. Wiley D. Forbus on several occasions, and finally on July 23, 1934, made an appointment with him to perform an autopsy. At that time she had already, a month or two previously, discussed the autopsy clause in the policy with her daughter, Miss Josephine Gorham (R., 41-42; Deft. Supp. 10). The terms of the agreement with Dr. Forbus are interesting when considered in connection with her mental capacity to get ready for this lawsuit. She bound him to secrecy as to his findings, whatever they might be. She bound him to deliver into her possession the material portions of the body, that is the brain, skull, and the scalp, and also the bullet. She bound him to destroy whatever materials were removed from the body and not delivered to her, by March 9, 1935, exactly two years from the date of death. The cross examination of her counsel (R., 166, top; Deft. Supp. 42), suggested the reason for this. It was her idea that the two year time limitation on suit also limited the defendant's right to demand an autopsy. On the 28th of July, 1934, she had the body exhumed and carried to Durham, and the autopsy made. She took the brain and calvarium and the bullet, on August 21, 1934, and carried them, with the pistol, to Washington, D. C., on August 23, 1934, to consult Lieut. Fowler, a ballistic expert in the Metropolitan Police Department. He examined and tested the bullet, or attempted to, but she

did not call him as a witness, or take his deposition. At this time Dr. Forbus had already informed her that in his opinion the wound was self-inflicted, and she was trying to prove that he was wrong. Then she employed her lawyer and had him write the letter on September 5, 1934. From that time on he was her representative. There is no suggestion that he was mentally incapacitated. The plaintiff herself did not testify to explain any of this evidence, showing that she had capacity to act in her own interests, notwithstanding her high-strung nerves. During the two year period in which Dr. Speight fixed her mental incapacity as practically total, she did all these things, in a highly intelligent manner, and with a shrewd eye for business, and even filed her complaints in the two suits against the insurance companies involved.

These complaints were filed February 25, 1933, while Dr. Speight said she was totally incapacitated until the operation in April, 1935. Although Dr. Speight testified that she was mentally normal after the operation in April, 1935, yet on January 16, 1936, she was present when the Pacific Mutual took Dr. Forbus' deposition, and reminded Dr. Forbus of his agreement not to divulge his findings, and personally insisted that he observe his contract in that respect by refusing to obey the subpoena to testify. Upon this evidence the district judge declined issues tendered by the plaintiff (No. 1 and No. 2) and submitted the issues No. 1 and No. 2 that immediate notice of accidental death was not given, nor was same given as soon as reasonably possible, and issue No. 3, that no affirmative proof of loss was ever furnished.

LAW APPLICABLE TO THE NOTICE AND PROOF OF LOSS REQUIREMENT: (a) She gave no timely notice, and (c) furnished no proof of loss before suit.

The provisions of the standard policy as to notice and proof of loss are valid, must be complied with, and the burden is upon the plaintiff to prove compliance. *Peeler* vs. *U. S. Casualty Co.*, 197 N. C. 286; *Moore* vs. *General Accident, Fire, and Life Insurance Company*, 173 N. C. 532; *Whiteside* vs. *Insurance Company*, 209 N. C. 536; *Fulton* vs. *Insurance Company*, 210 N. C. 394; *Williams* vs. *U. S. Casualty Company*, 150 N. C. 597.

In the *Peeler case, supra,* delay from May 1st to September 25th was held to be fatal; fifty days' delay was too much in the *Williams* vs. *Casualty Co. case, supra.*

That the beneficiary was unaware of the existence and limitations of the policy until after the time had expired, does not excuse compliance with such a provision. *Maryland Casualty Co.* vs. *Nellis,* 75 Fed. (2d) 23, Cert. Den. 56 S. Ct. 168.

This provision is enforced even though failure to give notice does not prejudice the insurer. *N. Y. Fidelity & Plate Glass Ins. Co.* vs. *Love* (C. C. A. 4th), 43 Fed. 2nd. 32; *Peeler* vs. *Casualty Co.,* 197 N. C. 286, middle page 290. The notice given must be intended as a notice. In fact Standard Provision No. 5 requires that it must be given by or on behalf of the insured or the beneficiary. A letter from a physician, not on behalf of the insured, and not intended as a notice, was held not to be a notice, in *Carter* vs. *Insurance Company,* 208 N. C. 665. A notice is insufficient if it is vague and uncertain. *McLawhorn* vs. *Insurance Company,* 208 N. C. 709.

The notice of September 5, 1934, was entirely insufficient in form. It was merely a notice that Dr. Gorham was dead, and this was not a life insurance policy, but an accident policy only.

From the penciled notation placed on Valentine's letter by someone, at some time prior to April 2, 1936 (we are left to guess), it would appear that the company somehow, some time, got information that this was a suicide. If this had been stated in Valentine's letter, it would not have been a notice of accidental death, within the coverage of the policy. It would have been a notice to the contrary that no claim could be made. In *Baba* vs. *Mutual Benefit Health & Accident Asso.,* (Mich., 1937) 276 N. W. 795, it appeared that "on August 2, 1934, the plaintiff wrote to defendant's home office, in which she stated, 'I am notifying you of my husband's death on June 4, 1934', enclosing with said letter a coroner's certificate, reading in part, 'The cause of death was acute mitral endocarditis (contributory cause, excessive heat)'. The court said: "The proof furnished by plaintiff in her letter of August 2, 1934, indicated that deceased had expired from heart disease. No intimation was given that the death had resulted from accidental circumstances, upon which contingency the liability of the

defendant was predicated under the terms of the policy. That defendant reasonably believed deceased had died from disease or natural causes is established by its letter of September 11, 1934. (Compare the penciled memorandum in this case of "Suicide, 3/15/33", B. & W.). Plaintiff's letter of August 30th furnished no additional information. If the proof furnished by plaintiff was erroneously submitted, it was encumbent upon her to correct or supplement same so that it would appear that the event upon which defendant's liability depended had occurred. This she did not do. Her failure to comply with the plain requirements of the policy precludes her recovery. See *Wachtel* vs. *Equitable Life Assurance Society of U. S., et al.,* 266 N. Y. 345; 194 N. E. 850 (85)". To the same effect is *O'Neil* vs. *Metropolitan Life Ins. Co.* (Mass., 1938), 15 N. E. 2nd. 809.

The plaintiff relies upon *Gorham* vs. *Ins. Co.,* 214 N. C. 526, as a State Court decision binding upon the Federal Courts, that as a matter of substantive law the notice given by the planitiff to this defendant on September 5, 1934, was a sufficient notice. As pointed out hereinafter the Gorham case did not decide that point, but it was decided purely on a procedural question, as to the sufficiency of the evidence of mental incapacity to go to the jury. But if it were a decision on substantive law as to the sufficiency of notice, it would not be controlling in this case because that case was decided upon the assumption that the Valentine letter gave notice of *accidental death,* instead of mere death. See the statement of facts at the bottom of page 528, in 214 N. C., where the court states the following: "It is in evidence that on September 5, 1934, I. T. Valentine, attorney for plaintiff, addressed a letter to the defendant, 'making claim on account of accidental death under this policy'." Whether justified by the record or not, that is the statement of facts upon which the court wrote its opinion. The letter described by the court is very different from that in this record. For that reason if the Gorham case were a decision on that point, it would not be the law of this case.

Although in reply to Valentine's letter, on September 14, 1934, the defendant expressly insisted upon compliance with notice and proof of loss provisions, and for fear of waiving them declined to furnish blanks for proofs, the

policy itself provides, in Standard Provision No. 6, that in such case the plaintiff might make proof otherwise than on blank forms. What is necessary to comply with this provision is set forth in *Misskelley* vs. *Insurance Company,* 205 N. C. 496, at pages 507-8. It is "such a statement of facts as, if established in court, would *prima facie* require payment of the claim". The plaintiff has never furnished any affirmative proof of loss, except the complaint filed in the first case. If these policy provisions were not waived, and they were not, and were expressly insisted upon, nothing was due under the express terms of the policy until sixty days after the filing of the proof of loss. And yet suit has been brought without any proof of loss ever having been furnished in this case.

(b) She Did Not File Either Notice or Proof as Soon as Reasonably Possible.

The plaintiff insists, however, that by reason of the evidence of Miss Josephine Gorham, Dr. Speight, Mrs. Rosenbloom, and J. S. Dozier, she was entitled to have the jury pass upon the question whether Mrs. Gorham is excused from giving any notice or filing any proofs, on the ground that she was mentally incapable of doing so. In this position she relies upon the case of *Gorham* vs. *Pacific Mutual Life Ins. Co.,* 214 N. C. 526. Rehearing denied, 215 N. C., page 195. Upon evidence as to mental incapacity somewhat stronger than, but similar to, that in this case, the court held (214 N. C. 532, middle) that the evidence was conflicting, that diverse inference could be drawn therefrom, and that the case should have been submitted to the jury. That is the entire content of the decision, the remainder of it relating to waiver, being *obiter dictum,* as we shall hereafter point out. If the Gorham case, as decided by the N. C. Supreme Court, were a decision as to substantive law, it would be controlling on this particular point, where the evidence is similar, in the Federal Courts. But it is not a decision on substantive law. It decides a purely procedural point, to-wit, what is sufficient evidence to go to the jury on the question of mental incapacity. The court had previously decided, in *Whiteside* vs. *Assurance Co.,* 209 N. C. 536, that to afford excuse the incapacity must be total incapacity to act in the matter not merely incapacity to make a contract. In

the Whiteside case, the court distinguished *Rhyne* vs. *Ins. Co.,* 196 N. C. 717; 199 N. C. 419, on the ground that in the Rhyne case the evidence showed that the insured was so insane that he was incapable of knowing that he had insurance, that he was required to pay a premium, that he was totally disabled or that he was required to furnish proof. These cases deal with substantive law. The Gorham case does not purport to modify the substantive law, but merely holds that on the evidence of Dr. Speight principally, there was sufficient evidence to submit the case to the jury.

Under *Erie R. R.* vs. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, where the jurisdiction of a Federal court is based upon diversity of citizenship the substantive law of the state controls (*Land Oberoesterreich* vs. *Gude,* (2d. Cir. 2/13/40; 109 Fed. 2nd 635, 638), but the Federal courts follow their own rules of procedure. The Erie case was decided Apr. 25, 1938 and on Sept. 16, 1938, the Supreme Court rules of procedure in civil cases in District Courts became effective throughout the nation. Rule 50 provides for motion for a directed verdict. Under what circumstances a verdict will be directed is determined by the Federal courts by uniform rule throughout the nation. The difference between substantive law and procedural law is well understood and has been applied since time immemorial in the trial of *transitory* actions in other states than those in which they arose. In the trial of such transitory actions:

> "(1) the law of the forum governs the proof in court of a fact alleged; (2) the law of the forum governs presumptions and inferences to be drawn from evidence". Comment: "(a) Proof in court covers all matters falling within the description 'burden of proof'.[4] *This includes what is sufficient evidence on an issue of fact to entitle the jury to consider it.* It also includes the burden of going forward with evidence; also the question of which party bears the risk of non-persuasion

[4] **But in a local action to recover land, the local rule as to burden of proof is a substantial property right and supplants the general rule of practice. This is the accepted Conflict of Laws rule. *Cities Service Oil Co.* vs. *Dunlap,* —— U. S. ——, 84 L. ed. Adv. Op. 185.**

of the trier of the facts." Sec. 595 *Restatement of the Law, Conflict of Laws, American Law Institute.*

Citing the foregoing section of the Restatement and applying it, the Court of Appeals of the District of Columbia in *Tobin* vs. *Penn. R. R. Co.,* 100 Fed. 2d 435 (*certiorari* denied, 306 U. S. 640), held that the law of the District of Columbia determines whether there is sufficient evidence to take the case to the jury, where the accident occurred in Pennsylvania and suit was brought in District of Columbia.

Also citing the Restatement, the Supreme Court of Mississippi, in *U. S. Fidelity & Guaranty Co.* vs. *Yost,* 183 Miss. 65, 82, held that where the injury occurred in Tennessee the case was to be determined by the substantive law of Tennessee, but the quantum of proof necessary to sustain a recovery was governed by the laws of Mississippi where the suit was instituted.

In *Clodfelter* vs. *Wells,* 212 N. C. 823, the North Carolina court held that in an action in this state on a transitory cause of action arising in another state, the substantive laws of the state wherein the cause of action arose govern, but matters of procedure which include methods of proof, production of evidence, as well as the rules for the submission of evidence to the jury, are governed by the laws of North Carolina," *so that whether the evidence offered was sufficient to require its submission to the jury* under the doctrine of *res ipso loquitur* was a matter to be determined in accordance with the law prevailing in this jurisdiction. *Harrison* vs. *Railroad,* 168 N. C. 382, 11 Am. Jur., Sec. 203, 78 A. L. R. 883, 89 A. L. R. 1278."

In *Rhulin* vs. *New York Life,* 304 U. S. 202, 82 L. Ed. 1290 at 1293, the court holds that "the *substantive* Pennsylvania rule" must be applied, even to ascertain what conflict of laws rule is enforced by the Pennsylvania court, that being a matter of substantive law. In that case there were five policies, applied for and delivered in different states. The Pennsylvania rule is the same as the rule in North Carolina that the substantive law of the place where the policy was delivered controls, (*Myers* vs. *Ocean Accident* (4th Cir.), 99 Fed. 2d 485), and in the subsequent trial of the Rhulin case the substantive law of more than one state had to be applied. 106 Fed. 2d 921. In the recent

case of *O'Reilly* vs. *Curtis Publishing Co.,* decided by the District Court of Mass. (Fed. 12, 1940), 31 Fed. Sup. 364 at 365, it was held that the Erie case requires the Federal court to follow the substantive laws of the state in which the cause of action arose, rather than the state in which the action is brought. That was a libel case embracing many counts, involving publication in various states. The Federal court applied the substantive law of the state in which each count arose in determining whether punitive damages were recoverable. The confusion which would result if the Erie case were construed to require the procedural law as well as the substantive law to be applied in cases such as the last two cited would be immeasurable. On identical evidence the court might have to submit to the jury some causes of action and direct a verdict as to others. Uniformity of procedure in Federal courts would be wiped out.

The Federal Judge is no way controlled by any state court's decision or rule (certainly in the absence of a statute) as to what evidence is sufficient to carry a case to the jury. The Federal courts are not bound by the so-called "scintilla rule" sometimes called the *"iota* rule" prevailing in some states. *New York Life* vs. *Sparkman,* (5th Cir., Feb. 5, 1939), 101 Fed. 2d 485, *Central Surety & Ins.* vs. *Murphy,* (10th Cir., Apr. 3, 1939), 103 Fed. 2d 117, 119, *McCaffrey, et al. vs. P.,* (2d Cir.) 103 Fed. 2d 326, *Farr* vs. *Union Pac.,* (10th. Cir., Aug. 30, 1939), 106 Fed. 2d 437, 439, *Guardian Life Ins. Co.,* vs. *Clum,* (3rd Cir., Sept. 4, 1939), 106 Fed. 2d 592, 595.

In the *Sparkman case* first cited the court said:

> "We do not agree with the appellee that if there is a different rule in Florida for determining whether the evidence is sufficient to take the case to the jury than that obtaining in the Federal Courts, the Federal Courts would be bound by it, for the question whether the evidence makes an issue for the jury is one to be determined by the Federal courts by their own processes of reasoning and conclusion and not according to any rule or standard which may be fixed for doing it by statute or decision of a state."

To illustrate the principle that Federal Courts are not bound by the State Court decisions on procedural questions, consider the case of *Gorham* vs. *Insurance Co.*, 214 N. C. 526. The majority opinion by way of dictum plainly intimated that the filing of an answer setting up the defense of suicide, and also the defense of non-compliance with policy conditions, is itself such a denial of liability on the ground of suicide that the other defense is waived. If the decision is so construed, it is a decision on procedural law alone. In a case in the Federal Courts that decision runs squarely into conflict with Rule 12-b of the Rules of Civil Procedure, which provides that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." In such a conflict there can be no doubt that the Federal Court would follow its own rules. Why should it make any difference that the rule of the Federal Court is established, not by the express terms of one of the new rules, but by a uniform line of decisions? The Conformity Act is superseded by Rule 83: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." 3 Moore's Federal Practice, p. 3443. *Coco-Cola Bottling Co.* vs. *Munn,* 99 Fed. 2d 190, 193, was tried under the Conformity Act, prior to the effective date of the new rules.

Plaintiff's brief, page 47, quotes from the brief of another insurance company, the Pacific Mutual, in another case, as binding on this defendant merely because the insurance company counsel were the same in both cases. The quotation relates to the binding effect of the State court decision on *substantive law.* Since it has been quoted, counsel here state that they had no other thought in mind.

According to the rule in the Federal Courts, and also in North Carolina (*Harrison* vs. *R. R.,* 194 N. C. 656; *Thigpen* vs. *Ins. Co.,* 204 N. C. 551; *Hill* vs. *Ins. Co.,* 207 N. C. 166; *Carter* vs. *Ins. Co.,* 208 N. C. 665; *Lee* vs. *Assurance Society,* 211 N. C. 182), though not applied in the Gorham case, opinion evidence of mental incapacity is a mere assertion or expression of opinion of no probative value, in the face of uncontradicted evidence of the performance of acts by the subject which he could not have performed if the opinion were true. In the Thigpen case there were

numerous witnesses who testified that the plaintiff was "neither physically nor mentally capable of discharging the duties of a court crier". The court disregarded the evidence of about a dozen persons, including physicians, that Mr. Thigpen was not mentally capable of doing what he did. The district judge in the case at bar followed the rule of the cases above cited, and the Federal rule (*Ocean Accident & Guaranty Co.* vs. *Moore,* 85 Fed. 2nd. 367, at 375), and disregarded the decision in the Gorham case. This he was justified in doing, either on the ground that it was not a decision on substantive law controlling this case, or on the ground that the long line of North Carolina cases established the rule, and that the Gorham case did not overrule them. In *Mangol* vs. *Metropolitan Life Ins. Co.,* (C. C. A. Ill., 1939), 103 Fed. 2nd. 114, the court applied the rule of a long line of earlier cases, rather than a later case of the State Court which did not clearly overrule the earlier cases. The Federal Court is not bound to follow the very latest decision on a point of substantive law. It is bound to declare the law from the whole body of the State Court decisions, on substantive law.

That the opinion evidence as to Mrs. Gorham's mental capacity was mere arbitrary opinion, appears from the following cross examination of Dr. Speight (R., 34 and 35; Deft. Supp. . . . .):

> "Q. Do you think that in the fall of 1934 she was capable of employing Mr. Valentine and Mr. Thorne to bring suit against this company?
>
> A. I do not think so. * * *.
>
> Q. If it should appear from the record of this court that she signed a complaint in an action brought against this insurance company on this policy, either in the fall of 1934, or prior to April, 1935, it would be your judgment that she did not know what she was doing?
>
> A. * * * I do not think so."

A court of justice will not permit itself to be hampered by arbitrary opinions of this character.

Besides, even these arbitrary opinions did not extend beyond the date of the operation in April, 1935. The plaintiff had previously employed counsel at least as early as September 5, 1934, when Mr. Valentine wrote his let-

ter; had previously February 25, 1935, verified and filed complaint prepared by Mr. Valentine, and signed cost bond. Thereafter on January 16, 1936, she appeared with Mr. Valentine at the taking of the deposition of Dr. Forbus, and continued his employment as counsel. Thus, at a time when there is no intimation of mental incapacity, she adopted and ratified her own act in employing Mr. Valentine, and all of his acts as her own. There is no intimation that Mr. Valentine was not mentally capable on and after September 5, 1934, of giving an adequate notice, and furnishing sufficient proof to at least make out a *prima facie* case. She cannot take the benefit of his representation of her after April, 1935, and repudiate his representation of her prior thereto. "A principal must ratify the agent's whole act, or disaffirm the whole, and cannot ratify a part, and disaffirm as to the rest, since a man cannot take benefits of a contract without bearing its burden." *King* vs. *Continental Casualty Company,* (C. C. A. 4th, April 10, 1940), 110 Fed. 2nd. page 950.

The plaintiff might have been in a better position if her attorney had done in September, 1934, what she had failed to do previously thereto, but there is not another case in the North Carolina Reports, where an action has been begun, like this, by or on behalf of a person claiming to be insane at the time the action was begun, where neither the plaintiff, nor his counsel, nor his guardian, if he had one, had previously furnished some kind of proof to put the company on notice of a claim purporting to come within the coverage of the policy; in the absence of waiver.

(d) *This Defendant Did Nothing Which Could Be Construed As a Waiver of the Policy Provisions Requiring Notice and Proof of Loss.*

The plaintiff tendered two issues which were aimed in the general direction of an issue of waiver.

As to issue No. 3 there was not the slightest evidence that the defendant was informed of the death of Dr. Gorham and the circumstances surrounding it within 90 days of its occurrence or at any other time, until this suit was begun, Feb. 25, 1935. Valentine's letter of Sept. 5, 1934, was merely a notice of death without stating that it was an accidental death, or even the date of the death. The plaintiff relies upon the pencil notice on the Valentine

letter when produced for the deposition on April 2, 1936, reading: "Suicide, 3/15/33, G. W." The burden was upon the plaintiff to show notice or waiver. There was no evidence introduced as to who made the notation or when, or whence came the information that Dr. Gorham died of suicide on 3/15/33. But full information on the part of the defendant that Dr. Gorham died of suicide on 3/15/33, or any other date, and no matter when such information was received, would not have been a waiver of the defendant's right to insist upon compliance with policy provisions. It was information that no valid claim could possibly be made on this policy. We have already seen that the courts have decided that such information is not sufficient notice or proof to satisfy the policy provisions. See the cases of *Baba* vs. *Mutual Benefit Health & Accident Assoc., Wachtel* vs. *Equitable Life Assurance* and *O'Neil* vs. *Metropolitan Life, supra.* What is insufficient as a notice or proof clearly is insufficient to constitute a waiver, if the information is received otherwise. Every loss is not made the subject of a claim. Unless it is, the company is not liable. It is even held that under a policy such as this (see Standard Provision No. 5), the notice must be given by or on behalf of the beneficiary, and a notice given by any other person with no intention of making claim, which is not accepted as notice by the company, is not sufficient. *Carter* vs. *Ins. Co.,* 208 N. C. 666, 7 *Couch on Insurance,* Secs. 1521-1521a. It is only when the company acts upon a notice given by a third person that it is bound. *Hilmer* vs. *Western T. Accid. Assoc.,* 27 L. R. A. (n. s.) 319, *Omaha Fire Ins. Co.* vs. *Dierks,* 43 Neb. 569 (cited in Gorham case, 214 N. C. 533).

The plaintiff relies on *Gorham* vs. *Ins. Co.,* 214 N. C. 526, as deciding this point in her favor. That was a "case of reversal" (see *New York Life* vs. *Gamer,* 106 Fed. 2d 375, 377), which was decided upon the single ground that there was sufficient evidence to go to the jury on the question of plaintiff's mental incapacity as an excuse for non-compliance. (See p. 532 middle). The Court then discussed under "Fourth" on page 535 the subject here under consideration. What is said by the Court on page 535 is in no way controlling on the Federal Court in this case for three reasons:

(1) It is obiter dictum. The court expressly says on that page: "We do not base our decision upon this ground however, as it is unnecessary to do so. The circumstance is mentioned only to show the attentuateness of the claim of forfeiture and to point out how the matter has been dealt with in other jurisdictions."

(2) The evidence which the court was discussing was very different from that in this case. That discussion was based upon the receipt by that company on June 16, 1933 (top page 529), of a certificate of death from its claim representative showing as cause of death "pistol shot wound of the head, entering the parietal region on right side. Apparently self-inflicted * * * suicide. Without attempting to justify the Court's dictum, nevertheless it must be recognized that the certificate of death did show death from violence. No such evidence was produced in the case at bar. There is no evidence that this defendant ever received that certificate of death. There is nothing but the pencilled notation on the letter. Plaintiff, having the burden of proof, failed to explain that.

3. The dictum on page 535, based upon decisions from other states entirely, is in conflict with the North Carolina case *Carter* vs. *Ins. Co.*, 208 N. C. 666, to the effect that information of "no claim" is not sufficient to dispense with "notice of claim".

The court also declined to give the issue relating to denial of liability for which plaintiff relied upon defendant's letter to Valentine of Sept. 14, 1934 (Plaintiff's appendix 7-8). Valentine's letter had given no date of death, nor had it stated the death was accidental. The company's letter stated that the policy had terminated April 1, 1933 and "if Dr. Gorham died before that time, it is apparent that no notice or proofs of loss had been filed within the time fixed by the terms of the contract and no reasonable opportunity has been had to investigate the matter, consequently we could not waive these conditions in the contract and furnish blanks for the purpose of considering the claim on its merits. * * * If our records are in error with reference to this contract we will appreciate your advising us of the error."

This is a denial of liability but it is based upon the express ground that no notice of proof of loss was furnished. That sort of denial is not a waiver of anything.

It expressly refused to waive these conditions. Since these conditions are valid and enforcible and are even required by the Standard Policy Act, it is apparent that the company had the right to retain their benefits. They were placed in the standard policy contract for some purpose. If a letter expressly refusing to waive them is to be construed as a waiver, how could a company ever take advantage of them?

A waiver is the intentional relinquishment of a known legal right. In *Fulton* vs. *Ins. Co.,* 210 N. C. 394, there was correspondence between the plaintiff's attorney and the company, which was relied upon as evidence of waiver. The Court said on page 397:

> "We do not concur in the position taken by the appellant that the defendant waived the defense of the lapse of the plaintiff's insurance by correspondence had with the plaintiff's attorney, and by requesting and receiving further information relative to the plaintiff's disability. All that was said and done occurred after Dec. 31, 1930. The plaintiff was asked to do and did nothing more than she was required by the terms of the policy to do to establish her claim. *There is no intimation in the correspondence of an intention to waive the defense of the lapse of the plaintiff's insurance or any other defense to the plaintiff's claim.*"

Except for the insistence upon forfeiture for want of notice and proof of loss on Sept. 14, 1934, there was no other evidence of a denial of liability except the answer filed in the first suit brought on this policy on Feb. 25, 1935.

Much of the discussion in the Gorham case (214 N. C. 532 to 534, inclusive), is devoted to the subject of waiver through denial of liability on the ground of suicide. This discussion of the North Carolina Court is in no way binding on the Federal Courts, for several reasons:

1. It is obiter dictum. The court expressly stated "that the matter was not debated in the trial court and not ruled upon", and that "it appears that the question of waiver will become an important one on *further hearing*", (Page 534). It was not the point of the decision.

2. If it be interpreted as a holding that pleading suicide and also breach of conditions in an answer, waives the latter, it is opposed to every other case in the North Carolina Reports; and it is the law of North Carolina, not any one decision, which the Federal Court should apply. Every case cited by the court held that notice is waived only by a distinct denial of liability, and refusal to pay *on other grounds and before time for filing has expired and before suit brought.* This appears from the opinions of all cases cited, except *Parker* vs. *Insurance Company,* 143 N. C. 339, and in that case it appears from page 25 of the record filed in the Supreme Court. Here the denial of liability was long after the time had expired (Sept. 14, 1934), and was not based on suicide, but on the distinct ground of breach of policy conditions.

3. The letter in that case was very different from the one in this case. In that case the Pacific Mutual replied, "The policy has not been in force for sometime and it would appear from your letter that there is no claim under the terms of the policy, because of the death of Dr. Gorham." Nothing was said in the letter about notice and proof not having been filed.

4. The plaintiff's counsel, by failing to insist upon this point, apparently agree with the statement in the dissenting opinion, that "I do not understand the majority opinion to hold as a matter of law that the denial of liability by the defendant in its answer * * * would constitute a waiver." (214 N. C., page 538.)

5. Such a decision would be on procedural law alone, and in exact conflict with Federal Rule of Civil Procedure, Rule 12-B, which provides that "no defense of objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." The Federal Court follows its own rules of procedure, whether established by express terms of a rule or a uniform line of decisions.

This case illustrates the importance to an insurance company of the conditions relating to notice and proof of loss. The plaintiff, the Rocky Mount Police Department, the coroner, were all satisfied that this was a case of suicide, from March 9, 1933, until Mrs. Gorham began to consult

lawyers and pathologists and ballistic experts in her determination to collect on these accident policies. She maneuvered secretly and took every step that a shrewd mind could devise to catch the accident insurance companies off guard. By the time they found out that she claimed accidental death or homicide, she had concealed the material portions of her husband's body and had bound the pathologists who did the autopsy to secrecy, and they had to make all their investigations in the time allowed to file answers in the suits. If there ever was a case in which a defense on the ground of want of notice and proof had merit, it is this case.

FOURTH QUESTION: DID THE PLAINTIFF VIOLATE THE AUTOPSY CLAUSE?

POLICY PROVISIONS:

Standard Provision No. 8: (Defendant's Supp., 107). "The association shall have the right and opportunity to examine the person of the insured when and so often as it may reasonable require during the pendency of claim hereunder, *and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.*

This is permitted by and in the form of C. S. Sec. 6479, Sub-sec. 8, Standard Accident Policy Act.

Additional Provision (b) (Deft. Supp., 108): "Strict compliance on the part of the insured and the beneficiary with all agreements and provisions of this policy, and the application signed by the insured, is a condition precedent to recovery, and any failure in this respect shall forfeit to the Association all right to any indemnity."

PLEADINGS:

The defendant especially pleaded the breach of the foregoing provisions in paragraph 8-c of its answer. Record proper, pages X, XI, XII. When pleaded, but only when pleaded, as a special defense, the burden is on the plaintiff to show compliance with this provision. (*Clay* vs. *Aetna Life Ins. Co.*, 1931, 53 Fed. 2nd 689; 15 A. L. R. 605, and note. 88 A. L. R. 975, and note.)

FACTS SHOWN BY THE EVIDENCE.

The plaintiff was committed to the State Hospital for Insane, as a drug addict, on May 18, 1933, and discharged

on probation, as cured, on August 18, 1933, and finally discharged according to hospital routine at the end of the year, on May 18, 1934. (Evidence of Dr. J. W. Ashby, Superintendent of State Hospital, R., 233, *et seq.*, Deft. Supp. 53-54.) She was at home after August 18, 1933. On or about July 23, 1934 (Evidence of Dr. W. D. Forbus, pathologist of Duke Hospital, R., 113, *et seq.* Deft. Supp. 23) the plaintiff employed Dr. W. D. Forbus to make a post-mortem examination to find out "something definite with regard to the death of her husband". On July 28, 1934, she had the body of her husband exhumed and carried to Durham to Duke Hospital, and on that day the post-mortem examination began. The findings of Dr. Forbus are stated in the record, pages 123 *et seq.* Dept. Supp. 27 *et seq.* He communicated his findings to Mrs. Gorham in a preliminary way (R., 137; Dept. Supp. 34) and then made her a final report on October 6, 1934. (R., 148; Deft. Supp. 39.) By the contract between them, the doctor was forbidden to divulge his findings to any other person than Mrs. Gorham, unless authorized by her "or other proper authorities" to do so. (R., 151; Deft. Supp. 40.) On February 25, 1935, Mrs. Gorham brought suits against the present defendant and another company, the Pacific Mutual Life Insurance Company, on accident policies. This was the first notice this defendant ever had of a claim that insured died as the result of "accidental means". The Valentine letter of Sept. 5, 1934, was merely a notice *of death* without stating the cause. The case against this defendant was removed to the Federal Court. The two companies then for the first time made investigation of the claims set forth in the complaints, discovered that an autopsy had been held, applied to Dr. Forbus for his findings, were refused (R., 119; Deft. Supp. 25); applied to Mrs. Gorham for her consent, and were refused. (Defts. exhibits U-1-2-3; Supp. 104-105).* Whereupon one of the insurance companies, the Pacific Mutual, whose case was

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* In her brief, p. 49, plaintiff complains that she was then (April 20, 1935) in hospital convalescing from her operations, and was still non compos. Her own evidence did not tend to show any opinion of incapacity beyond the date of the operations. (Piffs. App. 15). Deft's counsel knew nothing of plaintiff's illness. Deft. Supp. 86). With the burden of proof on her, she did not show that she made any point of the expense of the autopsy. She failed to respond to the request at all.

pending in the Superior Court of Nash County, took the deposition of Dr. Forbus on January 16, 1936. (R., 140; Deft. Supp. 36.)

The Pacific Mutual thereby exposed itself and also this defendant to the danger that Dr. Forbus would testify that on the plaintiff's *ex parte* secret autopsy he found evidence that the shot was fired from a distance, which would have been evidence of death at the hands of a third person. Fortunately, the plaintiff had selected a competent, honest pathologist who refused to act otherwise than in the capacity of an impartial investigator. Dr. Forbus' testimony as to the autopsy showed that the shot was fired from contact or near contact. This testimony was produced in the trial of the case against the Pacific Mutual Life Insurance Company, became a public record, and therefore available to this defendant for information. This defendant subpoenaed Dr. Forbus as a witness in its behalf, well knowing that the plaintiff would not put him on the stand. Dr. Forbus testified under compulsion of the law.

In the taking of the deposition of Dr. Forbus on January 16, 1936, Mrs. Gorham was present with her counsel, and strenuously objected to his testimony, on the ground that she had bound him by an agreement to keep his findings secret, except from her. She objected not only through her counsel, but personally. (R., 121; Deft. Supp. 26.) Dr. Forbus explained that he had the understanding with her before and at the time the contract was made with her that he would have to divulge his findings, if summoned by the legal authorities, and he complied strictly with his agreement. (R., 122; Deft. Supp. 26-27.)

This defendant's answer to the case then pending, begun February 25, 1935, was filed necessarily in the spring of 1935, many months before it was able to find out the result of the autopsy. It pleaded the suicide and also specially pleaded the breach of the autopsy provision, in the same form as in the answer in the present case, which is not the same action which was brought February 25, 1935, but a new action, brought after non-suit of the first.

The plaintiff tendered two issues relating to the autopsy, one as to timely demand, and the other as to whether defendant actually knew the result of the autopsy before the trial of this action. The Court refused these issues as not being supported by any evidence, and as not de-

terminative of the question, and submitted the issue: "Did plaintiff give defendant the right and opportunity to have an autopsy or its equivalent, as required by Standard Provision No. 8 in said policy," and directed the jury to answer it "No".

This phase of the case therefore presents in the main two questions: (1) Was the written demand on the plaintiff, of April 20, 1935, that she consent to disclosure by Dr. Forbus, a timely demand, under the circumstances of this case? (2) If so, did the defendant waive the breach of the autopsy clause by subpoenaing Dr. Forbus to testify in this case in its behalf, after it had discovered, by its own diligence, from the record in another case, what it might expect Dr. Forbus to testify?

PRINCIPLES OF LAW APPLICABLE TO THIS PHASE OF CASE.

On February 26, 1940, the 4th Circuit decided the case of *McCulloch* vs. *Mutual Life Insurance Company,* 109 Fed. 2nd 866, in which the law relating to the autopsy provision, such as contained in this policy, is stated as follows:

> "The policies in suit contained the following provision: 'The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.' Similar provisions in life and accident policies have been considered by the courts during the past forty years and for the most part have been strictly construed. This attitude has been deemed just, not only because the policy provision is phrased by the insurer for its own benefit and may be invoked as a condition precedent to work a forfeiture and defeat recovery, but also because an unnecessary or unreasonable exercise of the right of autopsy entails a course of action that is abhorrent to the sensibilities of surviving relatives and may involve a desecration of the grave."
>
> * * * * *
>
> "It is generally held that the right may not be exercised after burial if it was reasonably possible for the insurer to secure the privilege before the event. But the insurer may have been denied an autopsy be-

fore burial, or may have had no notice or insufficient notice of the death until after the interment; or circumstances such as fraud or mistake or uncertainty as to the true cause of death that make an autopsy reasonably necessary to the ascertainment of the truth may not have become known to the insurer until after the burial, notwithstanding the exercise of due diligence on its part. Under such circumstances, an autopsy ought not to be arbitrarily withheld, and the decisions so hold."

* * * * *

"The general principles involved are summed up in *Wehle* vs. *United States. Mut. Acc. Ass'n.,* 153 N. Y. 116, 122; 47 N. E. 35, 36; 60 Am. St. Rep. 598, as follows: 'The provisions as to the examination of the person or body of the insured was not only expressly assented to by the insured when he made application for the insurance, and therefore should be given effect as his express agreement, but it was a reasonable provision, and quite necessary in accident insurance, as affording a protection against fraud. * * * The effect of the giving of immediate notice was to impose upon the defendant the obligation immediately to make such investigation of the occurrence as to enable it to decide whether to insist upon its right to an examination of the body in order to satisfy itself as to the cause of the death."

* * * * *

"We do not think that there was any ambiguity with respect to the permission to examine the person or body of the insured, and if it should appear in any case that at some subsequent date after the interment of the body, circumstances or facts coming to the knowledge of the insurer warranted a reasonable belief that death was occasioned by means or causes excepted from the contract of insurance, a reasonable construction of this provision would authorize the insurer to insist upon an exhumation of the body and upon a dissection of it. * * *"

In *Clay* vs. *Aetna Life Ins. Co.,* 53 Fed. 2nd 689, it was held that where the company's local agents have knowl-

edge of the death of the insured under an accident policy, but no notice of claim on account of accidental death is given the company until after interment of the body, a demand for the right to have an autopsy is seasonably made as a matter of law after notice of claim of accidental death is given to the company. A refusal of consent on the part of the widow, as a matter of law, bars recovery. The burden of showing that such consent was given is on the plaintiff. And this is so, notwithstanding that the company had *"the power on a proper showing to a court of competent jurisdiction to compel it"*.

In *Sheean* vs. *Commercial Travelers Mutual Accident Asso.,* (Mass., 1933), 88 A. L. R. 975, at 980, it was held that "compliance with this provision was a condition precedent to the plaintiff's right to require payment of the loss, and the burden of proof of compliance, excuse for non-compliance, or waiver of the defense, based upon non-compliance, was on the plaintiff".

The autopsy provision is authorized by the statute of North Carolina prescribing the standard accident policy, and there is no decision of the court in North Carolina which throws any light upon the questions here presented. It is therefore the duty of the Circuit Court of Appeals to decide these questions, either by following the Federal decisions (Hayes, J., in *Cline* vs. *Southern R. R. Co.,* (D. C. N. C. February 29, 1940), 31 Fed. Supp. 657-659), or by determining what the Supreme Court of North Carolina would decide under the circumstances. Since there are no decisions in North Carolina it would seem that the Federal Court should declare the law according to its own judgment as to what the law is, and that it should follow the rules laid down in this circuit in the McCulloch case, which are the general rules.

The humane requirement of timely demand, which usually means before interment, is based upon the natural horror at disinterment of a deceased loved one. But the administration of justice requires that the feelings of the family of the deceased must give way, even where the insurer demands a disinterment, when the insurer has no sufficient notice of the necessity for an autopsy until after the burial. See the Clay case, *supra,* and also the McCulloch case. The time is counted against the insurer, not

from the death, but from the circumstances which first give it notice that an autopsy is necessary.

But in this case the horror at the desecration of the grave is not present. The plaintiff, the insured's widow, appellee, did not object to the opening of the grave, because she had it done herself, in a secret manner, without notice to the company, although she was familiar with the company's right under the policy. Her daughter testified that she was familiar with the autopsy clause in the policy, and discussed the same with her (R., 41, 42; Deft. Supp. 10-11). And Dr. Forbus testified that his agreement with the plaintiff contemplated that he would remove the material portions of the body, to-wit, the brain and skull, and that such materials as he did not deliver to her, he should keep until March 9, 1935, which was exactly two years after the death (R., 151; Deft. Supp. 40). Why she exacted this agreement was intimated by her counsel (R., 166; Deft. Supp. 42). It was her idea that the two-year time limitation against suit on the policy also limited the defendant's right to demand an autopsy. So she opened the grave, had the material portions of the body removed and placed in her possession, and to make doubly sure that defendant might never have access to them, she provided for the destruction of such materials as might not be delivered to her, all with complete understanding of the company's rights. When the company first knew that claim was made that Dr. Gorham died otherwise than by suicide, by the filing of the suit, February 25, 1935, it took some time for its investigation to proceed to the point that the fact of an autopsy was disclosed. This had to be ferreted out. The demand was made before filing the answer. It was made on April 20, 1935. The demand was not for exhumation of the body, or even that the materials in the Peoples Bank vault be turned over to the defendant (the defendant knew nothing about this), but only for a release of Dr. Forbus from his pledge of secrecy. If Dr. Forbus had informed the defendant that the autopsy indicated a homicide, rather than a suicide, it is probable that the plaintiff's action would not have been resisted on that ground. The granting of the defendant's request would have done the plaintiff's feelings no more harm than was done by the doctor's testimony in court. Under the circumstances of this case the demand on April 20, 1935, was

timely made as a matter of law, under the principles announced in the McCulloch case. If ever a defendant was placed at a disadvantage by the plaintiff in the preparation of its defense, it was this defendant in this case.

It is the law that the right to have an autopsy is not defeated by the fact that an autopsy may be compelled by court order. See the Clay case, *supra*. We think that this principle emasculates the plaintiff's contention that because the law provided the defendant with the remedy of forcing Dr. Forbus by subpoena to disclose his findings, the right to an autopsy was defeated. This principle also answers the plaintiff's contention that actual knowledge of the defendant, prior to the trial of this action, as to what Dr. Forbus would testify, was a waiver of its right to insist upon a forfeiture on account of the breach of the autopsy provision. The law places upon the plaintiff the burden of showing that she gave her consent. Had the plaintiff brought action against this defendant only, without also suing another company whose case was first tried, this defendant might have been frightened into a settlement of this case, through ignorance of the result of the autopsy. The autopsy clause was placed in the policy to give the defendant certain rights. It has received no information which it would not have received without the benefit of that clause. Its rights have been flagrantly violated in this case, and the provision of the policy that "strict compliance on the part of the insured and the beneficiary to all agreements and provisions of this policy is a condition precedent to recovery, and any failure in this respect shall forfeit to the association all right to any indemnity" should be enforced by the court.

CONCLUSION.

The action was dismissed upon a directed verdict on four independent grounds. If the ruling of the court was correct on any one of them, the judgment should be affirmed, notwithstanding error in some other ruling.

Respectfully submitted,

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